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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STEAMFITTERS LOCAL UNION NO. 420
WELFARE FUND, ET AL.,

Petitioners,

v.

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether health care payors can be deprived of standing to sue under the federal RICO and antitrust statutes for injury to their "business or property" caused by tobacco company defendants, on the ground that such suits are too "remote" and "indirect" as a matter of law, even though:

- the payors directly paid the medical costs in question and are the *only* plaintiffs that can assert RICO and antitrust claims to recover those costs — smokers cannot;

- relegating payors or smokers to piecemeal products liability lawsuits based on state law would completely defeat Congress' purpose of providing, in the RICO and antitrust statutes, potent remedies against persistent patterns of enterprise misconduct;

- measuring the payors' aggregate damages statistically would be *easier* and *more reliable* than ascertaining damages in separate personal injury claims by individual smokers; and

- the holding of the court of appeals below conflicts with numerous other decisions in the lower courts.

PARTIES TO THE PROCEEDING

The appellants in the court of appeals (plaintiffs in the district court) were:

Steamfitters Local Union No. 420 Welfare Fund
International Brotherhood of Painters and Allied Trades, District Council No. 21 Welfare Fund
International Brotherhood of Electrical Workers, Local Union No. 98, Health & Welfare Fund
Composition Roofers Union Local 30 Combined Health & Welfare Fund
Laborers' District Council Building & Construction Health & Welfare Fund
Carpenters Health & Welfare Fund of Philadelphia and Vicinity
Cement Mason's Union Local No. 592

on behalf of themselves and all other similarly situated.

The appellees below (defendants in the district court) were:

Philip Morris, Inc.
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
B.A.T. Industries P.L.C.
Lorillard Tobacco Company, Inc.
Liggett & Myers, Inc.
The American Tobacco Company
United States Tobacco Company
The Council for Tobacco Research — USA, Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Steamfitters Local Union No. 420 Welfare Fund, *et al.* ("Health Trusts") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-48a) is reported at 171 F.3d 912. The order of the district court (App. 49a-56a) is unreported.

JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1337, 1367; 15 U.S.C. §§ 15, 26; and 18 U.S.C. § 1964. The court of appeals had subject matter jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Third Circuit issued its opinion on March 29, 1999. The Health Trusts' timely filed petition for panel rehearing and suggestion for rehearing en banc was denied on April 29, 1999. App. 57a. On July 15, 1999, Justice Souter extended the time for filing a petition for certiorari to September 27, 1999.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and the antitrust laws are reproduced at App. 59a-60a.

STATEMENT

This case presents a question of enormous legal and public significance: whether, in a case in which the facts show a persistent and deliberate pattern of violations of the RICO and antitrust statutes, courts may deny standing under those statutes to plaintiffs that have borne the resulting economic costs.

In this case, the plaintiffs are Taft-Hartley health trust funds located in Pennsylvania that pay for medical benefits to workers, retirees, and their families. Some 33 million Americans are covered by this type of fund nationwide. The defendants are tobacco companies and related industry members. The tobacco defendants are alleged to have engaged in a decades-long fraudulent scheme to preserve their markets and avoid the costs of treating smoking-related diseases by counteracting smokers' efforts to quit; impairing health providers' ability to reduce costs through effective smoking cessation programs and safer cigarettes; and concealing the industry's active role in manipulating and perpetuating the resulting health care crisis.

Defendants' misconduct constitutes the core type of wrongdoing for which Congress determined, in enacting the RICO and antitrust laws, that the preexisting state and common law remedies were inadequate and that the litigation resources of affected businesses were needed to supplement governmental enforcement efforts. Indeed, the court of appeals did not deny the gravity of the charges against defendants or the sufficiency of plaintiffs' RICO and antitrust allegations. But the court held that the Health Trusts lacked standing to sue as a matter of law under RICO or antitrust to recover their damages, on the ground that the causal link between defendants' misconduct and the injury to the Trusts' business and property was too "remote" and "indirect" under common law principles of proximate cause and that the damages were too "speculative" — all because tobacco inflicts bodily injury on smokers in the course of causing economic harm to the Health Trusts. App. 5a, 9a, 25a.

The results of the court's holding are profound. First, it disqualifies on standing grounds the *only* plaintiffs that paid the medical costs at issue and suffered the economic loss to their business or property — i.e., the *only plaintiffs otherwise legally able to assert these RICO and antitrust claims*. Second, the holding below thereby relegates claimants against the tobacco

industry to the state and common law remedies[1] that Congress found to be historically *inadequate* when enacting the RICO and antitrust laws. Finally, the Third Circuit's denial of standing to the Health Trusts because the defendants have effectuated their scheme and ensured their profits by first causing bodily injury to persons connected to their business (their customers) ignores the fact that traditionally wrongdoing by RICO enterprises and antitrust violators has often involved bodily injury, and it is accordingly perverse to exclude that misconduct from the ambit of the statutes on standing grounds.

Although this cases arises in the context of tobacco, the decision below implicates broader and deeper issues of standing under federal statutes. This Court has *never* countenanced dismissal of a RICO or antitrust claim as too indirect without identifying a more directly injured party with the ability and incentive to sue to remedy the *same* statutory violation. Nor has this Court allowed narrow readings of the RICO and antitrust laws to undermine the broad remedial purposes of the statutes. But if the decision below is correct, then these federal laws are subject to standing requirements that contradictory their very statutory purposes.

Therefore, this is not just a tobacco case. The Third Circuit's judgment conflicts with numerous decisions outside the tobacco context and has sweeping implications beyond tobacco. In a complex economy, injuries to business and property are often mediated through effects on third parties. If a claim involving a straightforward and well documented causal chain can be disqualified simply because the chain can be described as indirect,

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[1] The Third Circuit did not dispute that individual smokers are legally unable to bring RICO or antitrust claims to recover the medical costs in question, which were paid by the Health Trusts, not the smokers. And the court acknowledged that there is "little danger of duplicative litigation or complex apportionment of damages among various groups of plaintiffs." App. 25a-26a. However, the court opined that only personal injury and product liability claims asserted by smokers (or such claims asserted in subrogation on behalf of smokers) could satisfy causation requirements.

then the RICO and antitrust statutes will be eviscerated. The Third Circuit created a new requirement for "direct" injury that conflicts with this Court's decisions in *Sedima v. Imrex Co.*, 473 U.S. 479 (1985); *Holmes v. SIPC*, 503 U.S. 258 (1992); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); *Associated General Contractors v. California State Council*, 459 U.S. 519 (1983) (*AGC*); and *Blue Shield v. McCready*, 457 U.S. 465 (1982).

There is a clear and deep division among the lower courts warranting certiorari. The Third Circuit's decision depriving health care payors of standing conflicts with such decisions as *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), and *Steele v. Hospital Corp. of America*, 36 F.3d 69 (9th Cir. 1994), which grant RICO and antitrust standing *only* to the health care payor, *not* to the individuals suffering bodily injury.

In addition, the Third Circuit's judgment conflicts with decisions in state tobacco litigation. Beginning in 1994, more than 40 state attorneys general sued the tobacco industry for health care costs borne by state treasuries. Many of these suits sought recovery for *state employee* health and welfare funds — the same type of recovery plaintiff Health Trusts seek here. In the state litigations court after court rejected the same remoteness argument adopted by the Third Circuit in this case. Only one state suit (in Indiana) was dismissed in its entirety, in a two-page order supplying no analysis or reasoning. The tobacco industry chose to settle the state suits for over $200 billion.

The Third Circuit's decision also merits review in light of the lawsuit filed by the United States on September 22, 1999 against the tobacco industry in the United States District Court for the District of Columbia, seeking recovery of smoking-related health care costs for Medicare recipients, veterans, military personnel, and federal employees. That lawsuit relies on the same allegations of industry misconduct as asserted by the Health Trusts in this case, and also includes RICO as one of its principal claims.

Plaintiffs simply seek access to the federal courts to proceed with their claims to determine, under applicable law, whether the

tobacco industry is responsible for the costs at issue. It is in the interests of all litigants that such access should not be unfairly foreclosed. The petition for writ of certiorari should be granted.

1. ***The history of defendants' fraudulent conspiracy.*** As the United States has explained in its recently filed lawsuit, the tobacco companies "have repeatedly and consistently denied that smoking cigarettes causes disease, even though they have known since 1953, at the latest, that smoking increases the risk of disease and death. [They] have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine. [They] have repeatedly and consistently stated that they do not market cigarettes to children while using advertising and marketing techniques to make their products attractive to children. Even though they have long understood the hazards caused by smoking and could have developed and marketed less hazardous cigarette products, [they] chose and conspired not to do so." Complaint in *United States v. Philip Morris, Inc.*, ¶ 4 (D.D.C. Sept. 22, 1999).

For example, despite the industry's claim that it does not target youth smokers, internal industry documents refer to children as "new replacement smokers" and contain such statements as:

". . . [T]he base of our business is the high school student."

". . . [W]e must get our share of the youth market."

"It is important to know as much as possible about teenage smoking . . . . [S]moking patterns of teenagers are particularly important to Philip Morris."

The industry also has denied that nicotine is addictive and that the companies manipulate nicotine levels. On April 14, 1994, the chief executives of all seven major cigarette manufacturers made such statements under oath before the House Subcommittee on Health and the Environment. William Campbell, then CEO of Philip Morris USA, testified that "I believe nicotine is not addictive." RJR CEO James W. Johnston testified that "smoking is no more addictive than coffee, tea or Twinkies."

Yet internal tobacco company documents show that such statements are false. A 1972 Philip Morris report stated: "The cigarette should be conceived not as a product but as a package.

The product is nicotine. . . . Think of the cigarette as a dispenser for a dose unit of nicotine." A 1972 RJR memo concluded: "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized, segment of the pharmaceutical industry." A Brown & Williamson scientist wrote in 1963: "I think that we can say even now that we can regulate, fairly precisely, the nicotine and sugar levels to almost any desired level management might require."

Illustrative is the experience of Victor DeNoble, hired in 1980 by Philip Morris to study the addictive properties of nicotine. The company instructed him to keep his work secret, even from fellow Philip Morris scientists. Test animals were delivered at dawn and brought from the loading dock to the laboratory under cover. In 1983, Philip Morris forced DeNoble to withdraw a study from publication in a scientific journal because the study showed that, in terms of addictiveness, "nicotine looked like heroin" (DeNoble's words). The next year, Philip Morris closed DeNoble's nicotine research lab. DeNoble and his assistant were forced to halt their studies abruptly, turn off all their instruments, and turn in their security badges by morning. According to DeNoble, the lab animals were killed, the equipment was removed, and all traces of the lab literally vanished overnight.

The industry also has suppressed the development of safer cigarettes. For example, Dr. James Mold of Liggett & Myers has stated that scientists "produced a cigarette which was, we felt, commercially acceptable as established by some consumer tests, which eliminated carcinogenic activity." However, all meetings on the project were attended by lawyers, and "[w]henever any problem came up on the project, the Legal Department would pounce upon that in an attempt to kill the project, and this happened time and time again." Liggett never marketed the safer cigarette, and its president "was told by someone in the Philip Morris Company that if we tried to market such a product that they would clobber us."

Dr. Jack E. Henningfield, who for 16 years served as an official of the National Institute on Drug Abuse (part of the National Institutes of Health) has testified that secret industry documents

"contain a lot of the keys to what we needed to know to prevent kids from taking up smoking." He described the industry's public posture as "lying and deceit and fraud." The Journal of the American Medical Association has editorialized that internal industry memoranda "show us how this industry has managed to spread confusion by suppressing, manipulating, and distorting the scientific record. . . . In summary, the evidence is unequivocal — the U.S. public has been duped by the tobacco industry. No right-thinking individual can ignore the evidence." *The Brown & Williamson Documents: Where Do We Go From Here?*, 274 JAMA 256, 258 (July 19, 1995).

In addition, the industry has lied to the courts and abused the judicial process. The companies have fraudulently asserted privileges for various incriminating documents by cycling them through their legal departments and outside law firms.[2]

Not surprisingly, the Florida trial court hearing the state's claim against the tobacco industry opined that the allegations "would seem to make out a case for 'the mother of all RICO actions.'" *Florida v. American Tobacco Co.*, No. CL95-1466, slip op. (Fla. Cir. Ct. Dec. 13, 1996).

2. ***Defendants' efforts to target third-party health payors.*** A primary aim of defendants' conspiracy was to externalize health

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[2] *See American Tobacco Co. v. Florida*, 697 So. 2d 1249, 1257 (4th Dist. Fla. App. 1997) ("There was also evidence that the defendants utilized their attorneys in carrying out their misrepresentations and concealment to keep secret research and other conduct related to the true health dangers of smoking."); *Minnesota v. Philip Morris, Inc.*, No. C1-94-8565, slip. op. (Minn. Dist. Ct. May 8, 1997) ("Plaintiffs . . . have made a *prima facie* case to invoke the crime fraud exception"), and slip op. (Dec. 16, 1997) ("review of the documents reveals a conspiracy of silence and suppression of scientific research"); *Washington v. American Tobacco Co.*, No. 96-2-15056-8, slip op. (Wash. Super. Ct. Nov. 21, 1997) ("the state has made a *prima facie* showing that R.J. Reynolds was engaged in or was planning a fraud at the time the communications were made"); *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 484 (D. Kan. 1997) ("RJR seems to believe . . . that when an attorney is somehow referenced within a document or generates a document, attorney-client privilege or work product immunity must protect disclosure of the subject document. Such is simply not the law.").

care costs so that they would be paid by third-party payors such as Heath Trusts. For example, internal tobacco company memoranda obtained by the State of Texas in its lawsuit admitted that "costs associated with smoking and health are not social costs but transfer payments." Specific among the costs identified by the tobacco companies were "hospital costs, other medical treatment, G.P. consultations, pharmaceutical, preventive medicine, rehabilitation, capital investment in medical facilities and research." Philip Morris acknowledged that "as health care costs rise astronomically, the opposition becomes armed with more potent weapons."

Other internal tobacco company memoranda stated:

• "We should influence medical and Government opinion and get each group to accept some responsibility for helping to solve what is seen as a major public health program rather than putting all the onus on the industry." BAT (1/1/74).

• "Cost to society has become a major theme for the [American Cancer Society (ACS)]. They assert that nonsmokers should not have to bear the medical costs associated with cigarette-caused disease. They argue that society in total (government, private or company medical insurance plans, etc.) bears the cost of illness or sickness caused by people smoking cigarettes. Thus, the ACS is suggesting [that] . . . the tobacco manufacturers pay the cost of all cigarette-caused illness and sickness, etc." RJR (5/26/77).

• "Health care costs are rising at an alarming rate: $42 billion in 1966, $163 billion in 1977, $310 billion in 1983 (anticipated). More industry antagonists are using an economic argument against cigarettes: i.e., cigarettes cause disease; disease requires treatment; major health care costs are borne by the government; the taxpayers pay in the end. . . . We must be prepared to counter this line of argument." Philip Morris (11/20/78).

3. ***Nature of the plaintiff health trusts.*** This suit was brought by seven Pennsylvania-based health funds as a class action on behalf of all similarly situated funds against eight tobacco companies and related industry organizations to recover for the Health Trusts' costs of treating their participants' smoking-related illnesses. The plaintiffs are joint labor-management, multi-employer health and welfare trust funds established pursuant to 29

U.S.C. § 186(c)(5) as legally distinct entities from the unions sponsoring them and the employers whose workers are covered by them. Such non-profit health trusts provide benefits to some 33 million American workers, dependents, and retirees and play a vital role in our national health care system, especially in unionized industries like construction, in which workers move from employer to employer, making single-employer health benefit plans impracticable. Each trust is governed by a board of trustees who administer the trusts for the sole benefit of the covered workers and dependents. With the help of professional consultants and administrators, the trustees decide what benefit programs will be maintained by the trusts (types of health benefits, benefit levels, eligibility, and so on). Any increases in tobacco-related medical costs act to deplete the funds available to pay for other treatment or preventive care, for smokers and non-smokers alike.

4. ***Procedural history.*** The complaint asserted claims under RICO and the antitrust laws, as well as state-law claims for misrepresentation, breach of special duty, unjust enrichment, negligence, strict liability, and breach of warranty. The complaint sought both damages and injunctive relief. The Health Trusts alleged two separate causal chains. First, the Health Trusts asserted that the defendants withheld information and treatment products from them and distorted the information they received. The Health Trusts alleged that, absent the defendants' misconduct, they would have reduced their medical costs by aggressively discouraging smoking by health plan participants; implementing smoking cessation programs; recommending or requiring that participant smokers use safer cigarettes; buying better nicotine treatment products sooner (like nicotine patches, gum, or inhalers); adjusting deductibles, co-payments, or coverage for health plans; or otherwise taking steps to design or operate health plans in a way that would have lowered smoking-related expenses.

Second, the Health Trusts asserted that cigarette makers withheld accurate information and safer cigarettes from smokers. The resulting increased medical illness of smokers imposed higher medical costs on the Heath Trusts.

The district court dismissed the complaint under Rule 12(b)(6),

citing "the general rule [that] has long been established that one who pays the medical expenses of an injured party does not have a direct claim against the tortfeasor who caused the injury." App. 50a-51a.

The Third Circuit affirmed on similar remoteness grounds. The court held that "however plaintiffs characterize their claims — as direct or indirect — they necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part." App. 25a. The court went so far as to rule that the Health Trusts could not even seek injunctive relief. App. 39a. The court decided the issue as a matter of law on a motion to dismiss, even though the issue of proximate cause is heavily fact-intensive and even though evidence obtained in state and private lawsuits has revealed that the tobacco companies took affirmative steps to shift smoking-related health care costs away from themselves and onto health care payors.

REASONS FOR GRANTING THE WRIT

The Third Circuit substituted a new test of proximate cause for the standard established by Congress. The court of appeals' judgment conflicts with the decisions of this Court in *Holmes*, *AGC*, and *McCready*, and with numerous decisions in the lower courts.

The RICO and antitrust standing inquiry uses three factors to identify the best plaintiff to bring suit and then concentrates the statutory cause of action in that person. In this case, the Third Circuit held that the *only* possible plaintiffs to assert the RICO and antitrust claims for the medical costs in question — the Health Trusts which have suffered the injury to business and property interests protected by the RICO and antitrust laws — are unable to sue. The court of appeals acknowledged that there were no more-directly-injured parties who could sue and that duplicative damages and apportionment were not serious problems. App. 25a-26a & nn. 9-10.

The Third Circuit's decision frustrates the purpose of the RICO and antitrust laws. These statutes were intended to overcome

limitations in state law by affording a potent new remedy to those whose business and property is injured by wrongdoing. "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima v. Imrex Co.*, 473 U.S. 479, 498 (1985). "Congress' concern [in enacting RICO] was not for the direct victims of the racketeer's acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers." *Id.* at 519 (Marshall, J., dissenting). RICO is designed to provide "enhanced sanctions and new remedies." Pub. L. No. 91-452, §1, 84 Stat. 922, 923 (1970). RICO states that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947. Indeed, one of Congress' objectives was to address defects and limitations in state law and state court proceedings. *See* RICO's "Statement of Findings and Purpose," Pub. L. 91-452, 84 Stat. 922 (1970).

Yet under the Third Circuit's ruling, the entire health care industry — one of the largest and fastest-growing segments of the United States economy — is disabled from suing the tobacco industry under the RICO and antitrust statutes for inflicting billions of dollars in medical costs through schemes to defraud and conspiracies to suppress product safety competition. These injuries to business and property "have allegedly undermined the financial health and stability of a critical industry in this nation — that devoted to health care of millions of people." *National Asbestos Workers Medical Fund v. Philip Morris*, No. 98 CV 1492, mem. op. at 31 (E.D.N.Y. Sept. 7, 1999). "Research or treatment which would have been supported by resources of the health care industry have, it contended, gone unfulfilled as a result of the defendants' racketeering. This is arguably precisely the type of economic injury which RICO was designed to address and deter." *Id.* at 32.

The Third Circuit eliminated the possibility of even injunctive relief, despite this Court's holding that the standing inquiry undertaken by the court of appeals does not apply to injunctive claims. *See* note 10, *infra*. The court effectively bestowed a civil immunity on tobacco companies that Congress repeatedly has

refused to legislate.[3]

By itself, the significance of tobacco litigation would warrant certiorari. There is a clear national interest in holding tobacco companies accountable for the public health devastation they have wreaked. More than 40 states have sued the tobacco industry since 1994. On Sept. 22, 1999, the United States brought its own lawsuit under RICO and other statutes to recover tobacco-related federal health care costs. This Court currently is considering the industry's challenge to anti-smoking regulations adopted by the Food and Drug Administration, which the Solicitor General has described as being "of overriding public importance" and as presenting "an unparalleled opportunity to prevent millions of children from beginning a highly addictive habit that often leads to premature death."[4] When this Court granted the FDA's petition for certiorari, the President stated that "I am very pleased that the Supreme Court has agreed to take up the case regarding the Food and Drug Administration's regulation of tobacco products. . . . Every day, 3,000 young people become regular smokers and 1,000 will have their lives cut short as a result." The immunity granted to the tobacco companies by the Third Circuit flies in the face of the national interest in holding them responsible for their misconduct.

Moreover, the decision below carries enormous implications beyond the tobacco context. A black-letter rule barring all claims by parties who pay the medical expenses of others would be

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[3] Legislation called for by the original proposed "global settlement" of state claims against the tobacco industry announced in June 1997 would have prohibited any future class actions by health care payors for smoking-related damages; the Senate voted 79-19 in March 1998 to adopt the Gregg Resolution to deny any such immunity. Gregg Amendment No. 2168, S. Con. Res. 86, 105th Cong., 2d Sess., 144 Cong. Rec. 39, S2811 (1998). During later negotiations, the issue of a "cap" on annual recoveries against the tobacco companies was proposed legislatively, and that, too, was rejected, 61-37, after extensive debate. Gregg-Leahy Amendment No. 2433, S. 1415, 105th Cong., 2d Sess., 144 Cong. Rec. 66, S5289-91 (1998).

[4] Petition for Certiorari in *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152.

absurd. For example, fraudulent overbilling or anticompetitive price-fixing by a cancer medicine supplier would not be actionable by the payor because it would not create any costs unless some third party cancer patient needed the medicine. Going beyond the health field, many injuries to business and property that Congress sought to remedy in the RICO and the antitrust laws involve multiple causation steps. If that alone were enough to render the statutes inapplicable, Congress' handiwork would be significantly nullified.

I. The Decision Below Is Demonstrably Wrong and Conflicts With This Court's Precedents.

For cases involving a causal chain that includes several potential plaintiffs harmed at different levels by a defendant's misconduct, this Court has formulated three policy factors to determine whether a given plaintiffs' injury is sufficiently proximate or direct to sustain an action for damages under the RICO and antitrust statutes:

(1) Whether more "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."

(2) Whether "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risks of multiple recoveries."

(3) Whether indirectness makes it "more difficult to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors."

Holmes, 503 U.S. at 269. *See also AGC*, 459 U.S. at 540-45.

The purpose of these factors is to identify which of several possible plaintiffs will be given standing to sue for a RICO or antitrust violation. The aim, in other words, is to produce the *best* plaintiff. The decision below produced *no* plaintiff. This Court has *never* dismissed a claim as too indirect without identifying a more directly injured party who could sue to remedy the same

violation.

In this case, the Health Trusts are the only potential plaintiffs that have suffered the economic losses at issue, and the only possible plaintiffs legally able to sue. Further, the Trusts, as special and favored creatures of federal law, are the most natural plaintiffs. Congress has bestowed on them the authority to sue in their own names, 29 U.S.C. § 1132(d)(1), and charged them with "ensur[ing] that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571 (1985). Congress has specifically provided that the trusts are not be regulated as insurers, *see* 29 U.S.C. § 1144(b)(2)(B), thus casting grave doubt on any suggestion that the trusts should sue in subrogation on behalf of their participants — wholly apart from the fact that proceeding smoker-by-smoker in subrogation would be so expensive as to be utterly impractical.

As health care payors for some 33 million American workers, dependents, and retirees, many of whom would otherwise lack coverage, health trusts play a major role in the health care delivery system in this country and accordingly are appropriate parties to enforce RICO and the antitrust laws. Indeed, the trusts represent the groups most at risk from smoking. Nine million people served by trusts are addicted smokers. Over 45 percent of workers are current smokers; over 40 percent of blue collar workers' children become hard-core smokers; and at least 25 percent of blue collar smokers continue to use cigarettes during pregnancy. The trusts spend over 10 percent of their budgets on treating smoking-related illnesses.

Thus, this is a not a case of selecting among several possible RICO or antitrust plaintiffs. There is only one group of candidates, and its members are perfectly suited to asserting the claims. In ruling otherwise, the court of appeals did not merely misapply the *Holmes/AGC* factors; rather, it created what amounts to a new legal test for proximate cause under the RICO and antitrust statutes, one which turns the concept of "standing" on its head.

1. ***Directness Is a Policy Conclusion, Not a Separate Factor.*** The Third Circuit improperly treated the supposedly "indirect"

nature of the Health Trusts' injuries as a separate factor to be weighed against the other *Holmes/AGC* factors. The court opined that "[t]he tortured path that one must follow from the tobacco companies' alleged wrongdoing to the Funds' increased expenditures demonstrates that the plaintiffs' claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out." App. 29a-30a. The court held that "the fulfillment of these [*Holmes/AGC*] factors is greatly outweighed by the extremely indirect nature of the Funds' injuries." App. 29a.

This Court has rejected that approach. Calling a particular causal chain "indirect" or "remote" is merely a conclusion that follows from applying the relevant policy factors. The proximate cause inquiry is not determined by any formal rule of indirectness. *See AGC*, 459 U.S. at 536 n.33 (specifically rejecting the black-letter "directness of the injury" or "target area" tests, stating that instead "courts should analyze each situation in light of the factors set forth in the text"); *see also Holmes*, 503 U.S. at 272 n.20.

This Court has held repeatedly that a plaintiff may sue even when his injury is derived from the effects of the defendant's misconduct on intervening third parties. In *AGC*, this Court opined that unionized subcontractors, who were the secondary victims of coercion by the defendants, would have antitrust standing even though their injury was indirect. *See* 459 U.S. at 541-42. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), this Court held that a Blue Cross plan participant had antitrust standing to bring suit against an alleged unlawful conspiracy between Blue Cross and participating psychiatrists, which was aimed not at the plaintiff but at psychologists.[5] In

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[5] The Third Circuit distinguished *McCready* on the purported ground that in this case the tobacco defendants supposedly aimed to affect smokers. App. 15a. But this is not what the complaint alleges, and the question of whom the defendants "aimed" at is a fact issue inappropriate for determination in the context of Fed. R. Civ. P. 12(b)(6). Nor was this factor ever mentioned in *McCready*, which rejected any intent-based limit. The *McCready* defendants could have *better* achieved their aim (driving psychologists out of business) if there had been no patients injured by the denial of reimbursement because that would have meant none continued to see psychologists.

Holmes, the Court recognized that its holding did not necessarily bar indirect claims (1) by brokerage clients suing for manipulation of stock they purchased from the brokerage firm, *see Holmes*, 503 U.S. at 272 n.19, and (2) by nonpurchasing brokerage clients suing for stock parking that had the effect of evading the firm's capital requirements. *Id.* And in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994), this Court indicated that a business has standing to sue for injuries to its property by virtue of racketeering-inflicted personal injuries to its workers.[6]

The Third Circuit's judgment also conflicts with other federal decisions outside the tobacco context holding that indirectly injured plaintiffs have RICO or antitrust standing under *AGC* and *Holmes* even though they were not the party directly deceived by the defendants' misconduct. In *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1414 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), for example, Chief Judge Posner, writing for the court, held that a health care payor alleging overcharges due to a division of markets by providers had standing to sue for the overcharges, even though they were incurred because of patients' bodily injuries (and would not have been incurred absent those injuries). Moreover, the court opined that the patients would not be given standing because vigorous private antitrust enforcement could be ensured only by concentrating the claim in

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[6] *Allied Tube v. Indian Head*, 486 U.S. 492, 495-96 (1988), held that a manufacturer of plastic conduit could sue a manufacturer of steel conduit who improperly influenced a trade association, which in turn promulgated a safety code that contained false product safety information about plastic conduit, which in turn influenced market participants either not to use plastic conduit or (even more indirectly) to disapprove its use by others. In *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), this Court recognized that indirect purchasers could bring suit when a direct buyer passed on the full price increase through a cost-plus contract. *Id.* at 736 *See American Soc'y v. Hydrolevel*, 456 U.S. 556, 560-64 (1982) (plaintiffs allowed to sue when defendant deceptively caused standard-setting nonprofit to issue misleading interpretative letter that in turn misled customers into not using plaintiffs' products); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (plaintiffs allowed to sue for securities fraud that deceived stock market professionals, who in turn affected the market price, which in turn harmed plaintiffs).

a single large suit by the Blue Cross payor. *See also Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994).

In *Mid Atlantic Telecom. Corp. v. Long Distance Servs.*, 18 F.3d 260 (4th Cir.1994), the Fourth Circuit held that a plaintiff telecommunications carrier had RICO standing to sue competing telephone company that deceived customers with artificially low rates and thus enticed them away from plaintiff. The court rejected "a rule that only injuries suffered by the immediate victim of a predicate act satisfied the 'by reason of' requirement of § 1964(c)" in favor of a "proximate cause analysis" that "should focus on the temporal and circumstantial relationship between the defendant's conduct and the injury suffered by the plaintiff, and the foreseeability that intervening events would cause injury to the plaintiff." *Id.* at 263.[7]

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[7] *See also Khurana v. Innovative Health Care*, 130 F.3d 143, 151-52 (5th Cir. 1997) ("RICO civil standing is not limited to only the immediate victim of a defendant's RICO violation." It is enough that indirect injury was "foreseeable by the defendants and could certainly be anticipated as a natural consequence of their alleged misrepresentations"), *vacated as moot*, 119 S. Ct. 442 (1998);

Israel Travel v. Israel Identity Tours, 61 F.3d 1250, 1257 (7th Cir. 1995) (*Holmes* did not preclude RICO standing for plaintiff who alleged defendant deceived its customers into not doing business with plaintiff, because in *Holmes*, "the Supreme Court observed that it did not mean to preclude all possibility of recovery for injury that was transmitted indirectly");

Raybestos Products Co. v. Younger, 54 F.3d 1234, 1241-43 (7th Cir. 1995) (business has RICO standing to sue for intimidation directed at its customers);

GICC Capital Corp. v. Technology Finance Group, 30 F.3d 289, 292-93 (2d Cir. 1994) (creditor has RICO standing to sue defendant who defrauded corporation when indirect harm is "reasonably foreseeable or anticipated as a natural consequence");

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1168-69 (3d Cir. 1993) (steel companies had antitrust standing to sue defendant railroad for suppressing self-loaders that intermediary vessel companies in turn could have used to transported ore to plaintiffs at lower cost than other transportation options) (The Third Circuit purported to distinguish *Lower Lake Erie* on the ground that in this case the misconduct

caused injury to the Health Trusts supposedly only after working its way through another party and altering that person's behavior. App.30a-31a. But that was equally true in *Lower Lake Erie*, in which the defendants denied a product (self loaders) to an intervening party (intermediary vessel companies) who thus incurred higher prices that they passed along in higher transportation prices to the plaintiff. In this case, the defendants denied a product (safer cigarettes) to an intervening party (smokers) who thus incurred injuries that were paid for by the plaintiffs.);

Cerebelli v. Elghanayan, 990 F.2d 62, 65 n.3 (2d Cir. 1993) (shareholder in cooperative has RICO standing to sue for fraud on cooperative because test under *Holmes* is whether indirect injury is "foreseeable");

Beiter v. Blomquist, 987 F.2d 1319, 1325 (8th Cir. 1993) (plaintiff has RICO standing to sue defendant for bribing government official, which resulted in denial of plaintiff's zoning application);

Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., 985 F.2d 102, 105 (2d Cir. 1989) (defendant who defrauded racetrack owner could be sued by those who in turn depended on racetrack for their livelihood, including "horse owners, trainers, drivers, grooms, blacksmiths, veterinarians, racing officials and pari-mutual clerks": "The test of proximate cause [under RICO] is whether the defendant's acts 'are a substantial factor in the sequence of responsible causation' and whether 'the injury is reasonably foreseeable or anticipated as a natural consequence.'");

R.R. Brittingham v. Mobil Corp., 943 F.2d 297, 304 (3d Cir. 1991) (RICO proximate cause is established when defendant's misconduct was a "substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence");

In re EDC, 930 F.2d 1255, 1279 (7th Cir. 1991) (purchaser of corporation has RICO standing to sue for fraud on corporation);

Taffet v. Southern Co., 930 F.2d 847, 856-57 (11th Cir. 1991), *vacated*, 958 F.2d 1514 (11th Cir. 1992) (utility customers have standing to sue utilities who defrauded rate regulators who in turn increased utility rates) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311-12 (2d Cir. 1990) (RICO) (same) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1101 (2d Cir. 1988) (defendant who defrauded corporation could be sued in RICO by corporate creditor) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

National Ass'n of Pharmaceutical Mfrs. v. Ayerst Lab., 850 F.2d 904, 912-13 (2d Cir.1988) (plaintiff had antitrust standing to sue defendant

Even if formalistic indirectness were a relevant factor, it could not possibly justify dismissing the claim (under the one-link causal chain) that plaintiff health funds were *directly* lied to, defrauded, and deprived of the benefits of new and safer tobacco products. The effect of defendants' misconduct on the Health Trusts was not mediated through any effect on a third party. The court of appeals labeled this direct claim as an "indirect connection" and brushed it aside on the ground that "[t]he alleged fraud simply prevents [plaintiffs] from reducing their expenses arising out of this preexisting relationship." App.25a. The court's distinction between fraud that causes action and fraud that induces inaction (a failure to reduce expenses) is unpersuasive as a matter of policy and unsupported by law. *See* RESTATEMENT (SECOND) OF TORTS § 531 (1965). Likewise, every antitrust conspiracy to withhold products causes injury by making others unable to take action — to buy the withheld product. The court of appeals' judgment therefore conflicts with this Court's decisions holding that conspiracies to withhold products, to fix product quality, or to withhold product safety information are actionable under the Sherman Act.[8]

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for disseminating deceptive product information to pharmacists that in turn caused those pharmacists to cease prescribing plaintiff's product);

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066-67 (3d Cir.1988) (plaintiff had antitrust and RICO standing to sue defendant who bribed a buyer, which in turn caused plaintiff to lose bid), *aff'd*, 493 U.S. 400 (1990);

International Travel Arrangers v. Western Airlines, 623 F.2d 1255, 1268 (8th Cir. 1980) (travel agents had antitrust standing to sue defendant for misleading advertisement directed at general public that in turn caused public not to use travel agents);

Prudential Ins. v. United States Gypsum, 828 F. Supp. 287, 289-92 (D.N.J. 1993) (asbestos makers who deceived those who bought their products and suppressed safer products could be sued by plaintiffs who did not buy asbestos but subsequently bought buildings containing asbestos).

[8] *See Allied Tube & Conduit Corp. v. Indian Head. Inc.*, 486 U.S. 492, 500 (1988); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 461 (1986);

2. ***No More-Directly-Injured Party Could Sue.*** The court of appeals acknowledged that no more-directly-injured parties could assert RICO or antitrust claims for these medical costs. App. 25a-26a, 29a. Smokers cannot bring RICO and antitrust claims because they did not pay the medical costs and cannot satisfy the "business or property" requirement in the RICO and antitrust statutes. *See Reiter v. Sonotone*, 442 U.S. 330, 338 (1979). But the Third Circuit erroneously downplayed this factor's significance by deeming it "subsumed" under the supposed "directness" factor. App. 23a. In fact, *no decision of this Court has ever dismissed a claim as too indirect without identifying a more directly injured party who could sue to remedy the same violation.* This Court has always stressed the need "that at least some party have sufficient incentive to bring suit." *California v. ARC America Corp.*, 490 U.S. 93, 103 n. 6 (1989). *Accord Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990) ("our interpretation . . . must promote the vigorous enforcement of the antitrust laws"). Accordingly, before denying standing to an indirect party under antitrust or RICO, this Court has inquired whether "the general interest in deterring injurious conduct" otherwise will be served by some more "directly injured victims [who] can generally be counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 269. Moreover, this Court has opined that it will not deny standing when that is "likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542. The Third Circuit's decision flies in the face of this principle.

3. ***No Duplicative Damages or Apportionment Problem Exists.*** The Third Circuit acknowledged that duplicative damages and apportionment pose no obstacle. App. 25a-26a, 29a. The court correctly concluded that this would be true even if smokers could bring claims alleging that they paid portions of their medical costs themselves or paid higher prices for cigarettes. *Id.* at 26a

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Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60 (1961). The court of appeals erroneously rejected antitrust injury for claims based on quality-fixing and suppression of safer products. App. 20a-21a. Review should be granted to correct the court's decision on this point.

n.10. Because the complaint does not seek recovery of any medical costs or higher prices paid by smokers themselves, their damages automatically would be excluded by any computation of the medical costs that the Health Trusts paid and accordingly would pose no duplicative damages problem necessitating complex apportionment. Thus, the court of appeals was correct that this "factor does not militate against a finding of antitrust standing, as there is little danger of duplicative litigation or complex apportionment of damages among various groups of plaintiffs." App. 25a-26a.[9]

But the court did not appreciate that this factor is designed to strengthen statutory enforcement by concentrating each clam in a single plaintiff, not to weaken enforcement by precluding claims by the sole plaintiff capable of suing. In RICO and antitrust cases involving effects of defendants' misconduct on multiple parties in a chain of causation and injury, this Court typically has granted standing to the party that is *first in line* in suffering *economic* injury. When standing is denied, it is the pass-on of the economic injury from a nonparty to the plaintiff, not the fact that the causal chain flows through several parties, that creates problems of the type the *Holmes/AGC* factors seek to avoid.

Thus, in *AGC*, the unionized subcontractors, not the plaintiff union, bore the first *economic* injury, even though the defendants' misconduct first causally affected general contractors' activities. In *McCready*, the employer was an intermediate causal link, but the employee plaintiff suffered the first economic injury by having to pay her psychologist without insurance reimbursement, so she was granted standing. In *Illinois Brick*, the direct purchaser suffered the first economic loss and was granted standing. In *Holmes*, the first party to suffer economic injury was the brokerage firm, so this Court granted standing to its trustee in bankruptcy, but

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[9] RICO and antitrust claims do not duplicate individual tort claims for fraud or products liability under state law, because tort law is focused on different wrongs with different elements. *See* 84 Stat. 947 (1970) (§ 904(b), P.L. 91-452) (RICO preserves state-law remedies "in addition" to RICO remedies); *ARC America*, 490 U.S. at 105 (Sherman Act does not preempt state law).

denied it to the plaintiff SIPC asserting subrogation claims on behalf of nonpurchasing brokerage clients.

In this case, the Health Trusts are the parties who suffer the "first step" of economic injury. They (and not individual smokers) paid the medical bills at issue. Thus, this factor should have weighed heavily in favor of concentrating RICO and antitrust damages claims in the Health Trusts, and the Third Circuit ignored this Court's teachings by holding otherwise.

4. ***Indirectness Does Not Make It "More Difficult" to Ascertain Damages***. The Third Circuit held that "damages claims are quite speculative (and very difficult to measure)." App. 26a. In so holding, the court of appeals fundamentally misconceived the proper inquiry established by this Court.

The test is not whether a damages claim is difficult or hard to prove in the abstract. Rather, the test is whether indirectness makes it "*more* difficult" to ascertain damages than if a more directly injured party sued. *Holmes*, 503 U.S. at 269 (emphasis added). The concern about relative difficulty of proof presupposes that a more direct party with more ascertainable damages could bring the same claim. If one does exist, statutory enforcement would be enhanced by giving that party standing because it will avoid the additional "problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269. Once again, the point is to *aid* statutory enforcement by giving the claim to the plaintiff who will face the fewest problems with causal proof, not to block enforcement. *See also McCready*, 457 U.S. at 475 n.11 (avoiding extra speculativeness of more remote claims encourages "vigorous enforcement of the antitrust laws by private suits").

The Health Trusts are the only possible plaintiffs for the claims in question. There is no other, more directly injured party who could sue. Thus, the relative judgment commanded by this Court — *which* plaintiff has the more easily ascertainable damages?— cannot be used to disqualify the Health Trusts' suit.

The court of appeals fallaciously stressed the causal complications of determining whether, absent the defendants' misconduct, smokers would have stopped smoking or smoked safer cigarettes, and how much in medical costs would have been

saved as a result. App. 27a. But the court was in no position to determine whether the evidence would be too speculative. No discovery has been taken in this case. No evidence has been introduced. Those courts that have actually tried tobacco cases — in Florida, Minnesota, Washington, and Ohio — have concluded that the plaintiffs did have acceptable damages models.

More fundamentally, the causal complications noted by the Third Circuit are not unique to suits by health care payors. The *same* supposed complications would apply to a personal injury product liability suit by individual smokers, whom the court conceded *could* show proximate cause. App. 26a n.10.

Indeed, the ability of the Health Trusts to proceed on aggregated statistical proof, rather than individuated proof, *decreases* the causal complications. Even though epidemiological and marketing studies can and do reach sound statistical conclusions about the effects of smoking on illness and of marketing on consumer behavior, *see, e.g.*, Ippolito & Ippolito, *Measuring the Value of Life Saving from Consumer Reactions to New Information*, 25 J. PUB. ECON. 53, 62 (1984) (changing smoker risk perception from the knowledge available before 1953 to the knowledge available in 1980 (after the government announced cigarettes were cancerous but before it announced they were addictive) reduces the number of packs smoked by 49.5%), one never can be entirely confident that these conclusions necessarily apply to any *particular* individual. "In a large population, random variations tend to cancel each other out, yielding an overall observed distribution that is far more useful in evaluating correlations, relationships and probabilities." *Allen v. United States*, 588 F. Supp. 247, 417 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987).

Nor is it problematic to aggregate a Trust Fund's damages across many beneficiaries. Businesses suing under RICO or antitrust routinely aggregate business damages across many transactions or consumers. *E.g., Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 572, 573 n.31 (1990) (approving use of statistical evidence). Aggregation poses a problem only when, as in a class action, a group of plaintiffs seeks a class-wide damages award to

be apportioned among class members. But *this is not a class action by individual smokers*. The aggregated costs of treating each Health Trust's patients would flow as damages to that fund.

Moreover, once the *fact* of antitrust damages is established, there is a relaxed standard for proving the *amount* of those damages because antitrust defendants should not be permitted to profit from the uncertainty created by their own antitrust violations. *See J. Truett Payne Co. v. Chrysler Motors*, 451 U.S. 557, 566 (1981). The Third Circuit did not doubt the *fact* of damages, App. 28a, yet its logic would immunize defendants from suit simply because their wrongdoing was so massive and varied that it was hard to measure precisely.[10]

II. The Decision Below Conflicts With Other Lower Court Decisions.

Review is warranted because of the deep divergence among the lower courts regarding the proper application of the *Holmes* and *AGC* factors in both tobacco and non-tobacco litigation.

1. ***State tobacco litigation.*** The Third Circuit's decision conflicts with numerous decisions in the states' litigation against the tobacco industry. Out of more than 40 state suits brought against the cigarette makers on similar legal theories and causal chains, all but one (Indiana) was sustained despite identical arguments that proximate cause was lacking because the injury was too remote or indirect. Twenty-three of the twenty-four courts in which tobacco companies moved to dismiss the states' actions sustained part or all of the complaints.[11] Some of these rulings

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[10] The court of appeals concluded that the same factors that justified denying standing to bring claims for damages also justified denying standing for claims for injunctive relief. App. 39a. Yet this Court has held that the *Holmes/AGC* factors do not apply to injunctive claims. *Cargill v. Monfort of Colorado*, 479 U.S. 104, 111 n.6 (1986). Review should be granted to correct the court of appeals' decision on this separate point.

[11] *See Alaska v. Philip Morris*, No. 1JU-97-915CI (1st Jud. Dist. Oct. 9, 1998); *Arizona v. American Tobacco Co.*, No. CV-SC-14769 (Ariz. Sup. Ct.

rested on special state statutes, but many did not and explicitly found the causal chain sufficiently proximate. For example, the court in *Texas v. American Tobacco*, 14 F. Supp.2d 956 (E.D. Tex. 1997), rejected a remoteness claim under *Holmes*, holding that "[w]ith respect to multiple recovery there can be none in this type of action. . . . [T]here can be no better party to prosecute this matter." *Id.* at 968. "With respect to the difficulty in determining damages, . . . difficulty in and of itself does not bar this action. . . . [T]he basic damage allegations provided thus far in the litigation counsel against a finding that this plaintiff is too remote. The State will attempt at trial to prove damages through the use of statistical evidence presented by way of a 'damage model.' In

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May 27, 1997); *Colorado v. R.J. Reynolds Tobacco Co.*, 1997 CV-003432 (Colo. Dist. Ct. Oct. 2, 1998); *Florida v. American Tobacco Co.*, CL 95-1466 AH, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996); *Hawaii v. Brown & Williamson Tobacco Co.*, No. 97-0441-01 (Haw. Cir. Ct. Sept. 18, 1998); *Idaho v. Philip Morris*, No. CV-OC-97-03239 *D (Ida. Dist. Ct. Sept. 2, 1998); *Illinois v. Philip Morris* , No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997); *Iowa v. R.J. Reynolds Tobacco Co.*, No. CL 71048 (Iowa Dist. Ct. Aug. 26, 1997), *Maryland v. Philip Morris*, 1997 WL 540913 (Md. Cir. Ct. 1997); *Massachusetts v. Philip Morris*, No. 95-7378-J (Mass. Super. Ct. Oct. 22, 1997); *Michigan v. Philip Morris*, No. 96-84281-CZ (Mich. Cir. Ct. May 28, 1997); *Minnesota v. Philip Morris*, 551 N.W.2d 490 (Minn. 1996); *Mississippi v. American Tobacco Co.*, No. 94-1429 (Miss. Chan. Ct. Feb. 21, 1995); *Montana v. Philip Morris*, No. CDV-97-306 (Mont. Dist. Ct. Sept. 23, 1998); *Nevada v. Philip Morris*, No. CV97-03279 (Nev. Dist. Ct. May 8, 1998); *New Jersey v. R.J. Reynolds Tobacco Co.*, No. C-254-96 (N.J. Super. Ct. Sept. 18, 1998); *Ohio v. Philip Morris*, No. 97CVH05-5114 (Ohio Ct. of Common Pleas Aug. 28, 1998); *Texas v. American Tobacco Co.*, 14 F. Supp.2d 956 (E.D. Tex. 1997); *Vermont v. Philip Morris*, No. S 744-97 CnC (Vt. Super. Ct. Mar. 25, 1998); *Washington v. American Tobacco Co.*, 1996 WL 931316 (Wash. Super. Ct. 1996); *West Virginia v. American Tobacco Co.*, No. 94-C1707 (W. Va. Cir. Ct. May 3, 1995); *McGraw v. American Tobacco Co.*, No. 94-C1707 (W. Va. Cir. Ct. Mar 31, 1997); *Wisconsin v. Philip Morris*, No. 97-CV-328 (Wis. Cir. Ct. Mar. 17, 1998). *See also Rosello v. Brown & Williamson Tobacco Corp.*, No. 97-1910 (JAF) (D.P.R. Aug. 10, 1998). Only Indiana's case was dismissed in its entirety, in a two-page order lacking analysis or discussion. *Indiana v. Philip Morris*, No. 49D07-9702-CT-000236 (Ind. Super. Ct. July 23, 1998).

general, the use of such evidence has been deemed permissible in this type of action." *Id.* In *McGraw v. American Tobacco*, No. 94-C-1707, slip op. at 6 (W. Va. 13th Cir. Feb. 13, 1997), the court refused to dismiss an antitrust claim, explaining: "This Court finds the opinion of *McCready* helpful. When one looks at the facts outlined in that opinion together with the allegations in the complaint, this Court finds dismissal unwarranted and improper." Similarly, the Supreme Court of Minnesota held that Blue Cross and the State of Minnesota had standing to sue the tobacco defendants for antitrust violations and other claims. *Minnesota v. Philip Morris*, 551 N.W.2d 490, 496-97 (Minn. 1996). Although the Minnesota antitrust statute is in some respects broader than its federal counterpart, the court explained that it would have found standing, even for Blue Cross, "[e]ven absent the statutory grant of authority in the antitrust statute." *Id.* at 497 n.1. And a Washington court held that the state would have antitrust standing even without a special statute because dismissal of the claim would leave "an antitrust wrong without a remedy." *Washington v. American Tobacco Co.*, 1996 WL 931316, at *5 (Wash. Super. Ct. 1996).[12]

2. ***Suits by other health care payors.*** Many courts in cases brought by private health care payors have sustained federal RICO and/or antitrust claims in the face of the same remoteness challenges. For example, in *Blue Cross & Blue Shield of New Jersey v. Philip Morris*, 36 F. Supp.2d 560 (E.D.N.Y. 1999), *recon. denied*, No. 98 CV 1492 (E.D.N.Y. Aug. 2, 1999), Judge Weinstein held that "an analysis of all three [*Holmes*] factors supports the plaintiffs' argument that their injuries were proximately caused by the defendants' pattern of racketeering." *Id.* at 575.[13]

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[12] *See also Alaska v. Philip Morris*, No. 1JU-97-915CI, at 3-4 (1st Jud. Dist. Oct. 9, 1998); *Arizona v. American Tobacco*, No. CV-96-14796, slip op. at 1-3 (Super. Ct. Maricopa Co. May 27, 1997); *Illinois v. Philip Morris*, No. 96L 13146, slip op. at 8-11 (Ill. Cir. Ct. Nov. 13, 1997); *Oregon v. Philip Morris*, No. 9706-04457, slip op. at 4 (Ore. Cir. Ct. Mar. 4, 1998).

[13] According to Judge Weinstein:

In *National Asbestos Workers Medical Fund v. Philip Morris*, 23 F. Supp.2d 321, 323 (E.D.N.Y. 1998), *recon. denied*, No. 98 CV 3287 (E.D.N.Y. Aug. 2, 1999), Judge Weinstein similarly denied a motion to dismiss on proximate cause and other grounds because "the plaintiffs' claims and defendants' defenses should not be decided in the abstract, but in the context of specific facts which must be developed in the record." He added that the plaintiff's claims "would materially advance the statute's legislative purposes of deterring racketeering, in all its forms, and of remedying, as fully as practicable, the economic consequences of racketeering." *National Asbestos Workers Medical Fund v. Philip Morris*, No. 98 CV 1492, mem. op. at 21 (E.D.N.Y. Sept. 7, 1999).

In *Arkansas Blue Cross & Blue Shield v. Philip Morris*, 47 F. Supp.2d 936 (N.D. Ill. 1999), the court denied the tobacco companies' motion to dismiss a health insurer's claim under *Holmes*. The district court addressed the Third Circuit's decision in this case and found it unpersuasive. Judge Bucklo observed that the health insurer was suing for its "own economic injury," not any

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"[T]here is no overlap in claims between the plaintiffs and their insureds. Only the Blues possess the equitable and legal claim to the costs they have incurred in the medical care and treatment of tobacco users and passive breathers of cigarette smoke. Only the Blues can claim the 'injury to business or property' required by the RICO statute. The Blues are the 'proper' plaintiffs; they have the necessary incentive and means to vindicate society's interest in enforcing the statute." 36 F. Supp.2d at 576.

"The apportionment concern does not pose a problem in the context of the present case because the plaintiffs and the insured smokers are not claiming the same injury. On the one hand, the Blues seek recovery only for the economic burden of those medical claims and procedures which they directly paid as a result of tobacco use. The plaintiffs' insureds, on the other hand, have personal injury claims for the emotional harms and consequential damages resulting from tobacco use. There is no risk of double recovery because the insureds do not have an equitable claim to the costs incurred directly by the Blues." *Id.*

"The aggregation of millions of alleged injuries in the instant suit can be expected to yield more accurate results with respect to the causation issue since projections based upon a large statistical base will be available, thus reducing the size of the possible error." *Id.* at 575.

"derivative" injury. *Id.* at 938. With respect to the measurement of damages, the court concluded that "plaintiffs may well be able to bring reliable statistical and expert evidence to show the percentage of damage caused by defendants' actions." *Id.* at 939. The court also held that there was no danger of duplicative damages or complex apportionment: "the damages claimed in this case are separate from the damages suffered by smokers. Plaintiffs 'seek recovery only for the economic burden of those medical claims and procedures which they directly paid as a result of tobacco use.'" *Id.* "[I]n the present cases Blue Cross is the best, and under some case law perhaps the only, plaintiff who can bring this claim because no other potential plaintiff can claim economic injury." *Id.*[14]

In *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris*, 23 F. Supp.2d 771 (N.D. Ohio 1998), the court denied the defendants' motion to dismiss a union health care trust fund case on remoteness grounds. The court held that, "[h]aving found that proving the plaintiffs' damages flowed from defendants' RICO violation is not unduly difficult, and having found there is little risk of double recovery for defendants purported RICO violations, and having found that, if proven, defendants conduct is sufficiently injurious to warrant deterrence, the factors described in *Holmes* suggest this Court not dismiss plaintiffs' RICO counts on standing

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[14] Subsequently, the defendants in that case moved for reconsideration, citing *Laborers Local 17 Health & Benefit Fund v. Philip Morris*, 172 F.3d 223 (2d Cir. 1999) (discussed *infra*). The district court denied reconsideration, explaining it did not believe "that a motion to dismiss is the time to decide that plaintiffs will not be allowed to present their proof," that the court did "not think there is likely to be much difficulty in apportioning damages," and that it disagreed "that plaintiffs are likely to be reimbursed by smokers actions against defendants." "The undeniably high expense undoubtedly prevents all but the very few (those with the worst injuries, and probably few of those) from attempting such suits." *Arkansas Blue Cross & Blue Shield v. Philip Morris*, No. 98-C-2612, slip op. (N.D. Ill. Aug. 2, 1999). Nonetheless, the court stated that it "could not reconcile" the Second Circuit's decision in *Laborers Local 17* with governing Seventh Circuit precedent and certified the case to the Seventh Circuit under 28 U.S.C. § 1292(b) on the proximate cause question.

or proximate cause grounds." *Id.* at 786.[15]

In *Utah Laborers' Health & Welfare Trust Fund v. Philip Morris*, No. 2:98 CV 403B (D. Utah Mar. 31, 1999), the court denied a motion to dismiss the claims of union health care trust funds on remoteness grounds.[16] In *Kentucky Laborers District Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc.*, 24 F. Supp.2d 755, 770 (W.D. Ky. 1998), the court found RICO standing for allegations that the defendants' misrepresentations "prevented the Funds from pursuing proactive measures such as smoking cessation programs and other educational efforts to reduce smoking among the Participants."

State courts also have rejected the Third Circuit's approach to proximate cause. In *Steamfitters Local Union No. 614 Health Fund v. Philip Morris*, No. 92260-2, slip op. (Tenn. Cir. Ct. Jan. 29, 1999), for example, the court denied a motion to dismiss a union health fund's state-law suit on proximate cause grounds, opining that "proximate cause is always to be determined upon the facts of each case." *Id.* at 6.[17] A California state court recently denied a motion to dismiss on remoteness grounds state-law actions by union health and welfare funds. *In re Tobacco Cases II*, JCCP 4042 (San Diego Super. Ct. July 14, 1999). The case is scheduled to go to trial in June 2000.

Review should be granted because the Third Circuit's newly minted "directness" rule conflicts with all of these cases.

3. *Decisions Agreeing With the Third Circuit.* A number of other lower courts have committed the same error as the Third Circuit and have precluded health and welfare funds from suing the tobacco industry for medical costs under RICO and the

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[15] The defendants later prevailed at a trial on the merits in *Iron Workers*, and a notice of appeal from the defense verdict has been filed.

[16] The plaintiff subsequently agreed to the defendants' motion for an interlocutory appeal under 28 U.S.C. § 1292(b). *See also West Virginia Laborers' Fund v. Phillip Morris*, No. Civ. 3:97-0708 (S.D.W.Va. Aug. 12 1998), *later voluntarily dismissed* (similarly rejecting remoteness objection).

[17] Plaintiff subsequently agreed to defendants' motion for an interlocutory appeal.

antitrust statutes. These decisions, some of which have expressly cited and followed the Third Circuit's decision, only serve to underscore the need for this Court to grant review in this case. The issue has percolated in the lower courts for long enough.

For example, the Ninth Circuit explicitly relied on the Third Circuit's decision in dismissing a trust fund suit on the ground that "all of plaintiffs' claims rely on alleged injury to smokers . . . . [T]here is no 'direct' link between the alleged misconduct of defendants and the alleged damage to plaintiffs." *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris*, 1999 U.S. App. Lexis 15711, *11 (9th Cir. July 14, 1999). The Second Circuit fell prey to a similar fallacy in holding that "the critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct." *Laborers Local 17 Health & Benefit Fund v. Philip Morris*, 172 F.3d 223 (2d Cir. 1999), *amended*, 1999 U.S. App. Lexis 19576 (Aug. 18, 1999).[18] The Northern District of Illinois already has observed that the Second Circuit's decision is irreconcilable with Seventh Circuit precedent. *See* note 14, *supra*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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[18] *See also Texas Carpenters Health Benefit Fund v. Philip Morris*, 21 F. Supp.2d 664 (E.D. Tex. 1998), *appeal pending*; *Seafarers Welfare Plan v. Philip Morris*, 27 F. Supp.2d 623 (D. Md. 1998); *Contractors Health & Welfare Plan v. Philip Morris*, No. 8:98CV364, slip op. (D. Neb. Feb. 18, 1999); *Hawaii Health & Welfare Trust Fund v. Philip Morris*, No. 97-00833-SPK (D. Haw. Jan. 21, 1999); *Laborers & Operating Engineers' Utility Agreement & Welfare Trust Fund v. Philip Morris*, No. Civ. 97-1406 PHX SMM (JWS), slip op. (D. Ariz. Feb. 10, 1999); *Southeast Florida Laborers v. Philip Morris*, No. N7-8715-CIV, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998).

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Appendix A

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND; INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL NO. 21 WELFARE FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 98, HEALTH & WELFARE FUND; COMPOSITION ROOFERS UNION LOCAL 30 COMBINED HEALTH & WELFARE FUND; LABORERS' DISTRICT COUNCIL BUILDING AND CONSTRUCTION HEALTH AND WELFARE FUND; CARPENTERS HEALTH & WELFARE FUND OF PHILADELPHIA AND VICINITY; CEMENT MASON'S UNION LOCAL NO. 592, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS,

v.

PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES P.L.C.; LORILLARD TOBACCO COMPANY, INC.; LIGGETT & MYERS INC.; THE AMERICAN TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; THE COUNCIL FOR TOBACCO RESEARCH — U.S.A., INC.; THE TOBACCO INSTITUTE, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC., APPELLEES.

No. 98-1426

United States Court of Appeals for the Third Circuit

171 F.3d 912

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BECKER, Chief Judge.

This is one of a vast number of cases filed in state and federal courts all over the nation seeking to hold tobacco companies liable for the smoking-related costs incurred by union health and welfare funds. The plaintiff funds allege that they were defrauded by the defendants — tobacco companies and related industry organizations — into paying for their participants' smoking-related illnesses, as well as prevented by these defendants from informing the funds' participants about safer smoking and smoking-cessation products. The defendants allegedly conspired to prevent the funds from obtaining and using information that would have reduced the incidence of smoking — and therefore of illness — among the funds' participants. The fraud and conspiracy charges are the underpinnings of plaintiffs' federal statutory claims, which are brought under the antitrust laws and the civil RICO statute. Plaintiffs also assert state common-law claims based on supplemental jurisdiction.

The District Court dismissed plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6), on the ground that the claimed injuries of the plaintiff funds were too remote from any

wrongdoing of the defendants to be redressable under either federal or state law. The correctness of that conclusion is the primary issue on this appeal. Put another way, we are called upon to determine whether plaintiffs have alleged a compensable injury proximately caused by defendants' allegedly fraudulent and conspiratorial conduct sufficient to avoid dismissal under Rule 12(b)(6). This basic proximate cause inquiry, drawn from tort law, is complicated by the allegations of intentional tort, the packaging of plaintiffs' claims in RICO and antitrust terms, and the addition of state-law claims based on fraud, special duty, unjust enrichment, negligence, strict liability, and breach of warranty. In the end, we conclude that the District Court correctly dismissed all of plaintiffs' primary claims as being too remote from any alleged wrongdoing of defendants, and the other claims as concomitantly lacking in merit; hence, we affirm the dismissal of the complaint in its entirety.

I. Background

A. Facts and Procedural History

This suit was brought by seven Pennsylvania-based union health and welfare funds (the "Funds") as a putative class action on behalf of all such similarly-situated funds against eight tobacco companies and certain industry organizations (collectively, the "tobacco companies")[1] to recover for the Funds' costs of treating their participants' smoking-related illnesses. The suit is patterned after similar suits brought by state attorneys general, which were recently settled with the tobacco

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[1] The defendants include tobacco companies Philip Morris; R.J. Reynolds; Brown & Williamson; B.A.T. Industries; Lorillard; Liggett & Myers; the American Tobacco Company; and the United States Tobacco Company. In addition, named as defendants are the Council for Tobacco Research-USA; the Tobacco Institute; Smokeless Tobacco Council; and Hill & Knowlton, a public relations firm.

companies for more than $ 200 billion.[2] See Barry Meier, Remaining States Approve the Pact on Tobacco Suits, N.Y. Times, Nov. 21, 1998, at A1.[3]

In the present case, the Funds have brought federal claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and the antitrust laws, 15 U.S.C. § 1. Their complaint also includes, under the supplemental jurisdiction statute, 28 U.S.C. § 1367, state-law claims for misrepresentation, breach of special duty, unjust enrichment, negligence, strict liability, and breach of warranty. The Funds seek both damages and extensive injunctive relief requiring the defendants to disclose any research on smoking that they have concealed, engage in a public education campaign to reduce smoking, cease advertising their products to minors, and fund

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[2] The parties cite a large number of reported state and federal opinions of this genre (of both the union fund and attorney general variety), and have also provided us with a considerable number of unreported decisions. For the benefit of students of this litigation war, we list these decisions in an Appendix to this opinion. We note that in the vast majority of the union fund cases cited by the parties (15 of 20), at least some of the plaintiffs' claims were dismissed. In 11 of the 20 cases (including the present one), courts have dismissed the plaintiffs' entire case. In the only case to reach a jury, the tobacco companies recently prevailed in federal court in Ohio. See Barry Meier, Verdict Backs Cigarette Makers in Suit by Union Health Funds, N.Y. Times, Mar. 19, 1999, at A10.

[3] Although the tobacco companies and state attorneys general have reached an agreement resolving the state suits, the litigation surrounding these cases is apparently far from over. See, e.g., Ann Belser & Mark Belko, County Files Suit Against Tobacco, Pitt. Post-Gazette, Mar. 6, 1999, at A1 (noting that Allegheny County, Pennsylvania, had filed suit against the tobacco companies in federal court at the same time it was seeking in state court to block final approval of the settlement by the attorneys general). In addition, the federal government appears poised to act. See White House Office of Communications, FY2000 Budget Summary and Supporting Materials (Feb. 1, 1999), available in 1999 WL 42060, at *46 ("To recover these losses [from tobacco-related health problems], the U.S. Department of Justice intends to bring suit against the tobacco industry, and the budget provides $ 20 million to pay for necessary legal costs.").

smoking-cessation programs.

The Funds allege, inter alia, that the tobacco companies conspired to suppress research on safer tobacco products, defrauded health care providers and payers by informing them that the companies' tobacco products were safe, and caused smokers to become ill by preventing the dissemination of smoking-reduction and smoking-cessation information. All of these actions allegedly caused the costs of smoking-related illnesses to be shifted from their proper source, the tobacco companies, to the plaintiff Funds (and others). This shift in costs purportedly was accomplished through the intentional and fraudulent actions of the tobacco companies, directed at both smokers and the Funds themselves.

Seeking to recover for these costs, the Funds filed suit in the District Court for the Eastern District of Pennsylvania in August 1997. Shortly thereafter, the defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), and, in an order accompanied by an unpublished opinion, the District Court granted the motion. *See Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 1998 U.S. Dist. LEXIS 5951, No. CIV.A.97-5344, 1998 WL 212846 (E.D. Pa. Apr. 22, 1998). The Court relied on two general grounds to dismiss the entire complaint, and invoked a number of additional rationales to reject the Funds' specific claims. First, it held that plaintiffs did not state a claim because of "the general rule [that] has long been established that one who pays the medical expenses of an injured party does not have a direct claim against the tortfeasor who caused the injury." *Id.* at *1. The District Court decided, however, that it "need not dwell upon this issue," as the Funds' claims "suffer from an even more fundamental flaw, namely, the fact that plaintiffs have not suffered any cognizable damages." *Id.* at *2.

The District Court reasoned that the Funds' increased costs for smoking-related illnesses caused them no injury because "plaintiffs are merely handling the payments with money

provided by others, and have no genuine stake in the matter," *id.*, and "cannot claim to have suffered any economic loss in the form of lost profits," *id.* at *3.

The District Court also dismissed the complaint because (1) plaintiffs "allege no injury of the sort the antitrust laws were designed to prevent"; (2) the Funds' common-law fraud claims "are entirely too speculative to be taken seriously"; (3) plaintiffs "simply do not have legal standing to advance" claims for injunctive relief; (4) the state special-duty claim is "restricted to 'physical harm'" that plaintiffs do not allege they suffered; and (5) the Funds' unjust enrichment claim "is simply a subrogation claim expressed in different language." *Id.* at *3-4. Plaintiffs filed a timely notice of appeal. We have appellate jurisdiction under 28 U.S.C. § 1291. Our review of the District Court's order is plenary. *See Gallo v. City of Philadelphia*, 161 F.3d 217, 221 (3d Cir. 1998). We accept as true all factual allegations in the complaint and will affirm a dismissal under Rule 12(b)(6) only if "it is certain that no relief can be granted under any set of facts which could be proved." *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 262 n.12 (3d Cir. 1998) (internal quotations omitted).

B. The Allegations and Theory of the Complaint

Plaintiffs' complaint is voluminous (containing 317 paragraphs and running to 116 pages) and detailed in its explication of the history of the tobacco companies' alleged wrongdoing. By now, this history is well-known to the public at large, though plaintiffs rely heavily on the fact that the defendants successfully conspired to cover up their wrongdoing for almost five decades.

This conspiracy was allegedly directed at both smokers and the plaintiff Funds themselves. Therefore, plaintiffs aver, they are both indirect and direct victims of the defendants' wrongful conduct.

1. The Indirect Injury

The Funds' indirect injury allegedly arises from the fact that they paid millions of dollars for the smoking-related medical expenses of Fund participants whom they say were victimized by the tobacco companies' conspiracy and fraud. The defendants respond that this indirect claim is simply a traditional subrogation claim dressed up in treble-damages federal statutory clothing. They invoke the general principle that an insurer's only claim against a tortfeasor for the insurer's costs arising out of wrongdoing against an insured is by way of subrogation. *See, e.g., Great Am. Ins. Co. v. United States*, 575 F.2d 1031, 1033 (2d Cir. 1978). Generally, if an insurer wishes to recover from the wrongdoer, it must assert the same claim — by way of subrogation — that the insured could have asserted against the wrongdoer, as well as be subject to the same defenses that the wrongdoer could assert in defense of the claim. The defendants argue that the Funds could seek to recover the costs of treating participants' smoking-related illnesses only through tort actions such as those that have been asserted individually by smokers. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992).

2. The Direct Injury

In plaintiffs' submission, notwithstanding defendants' argument that all of the Funds' claims are essentially subrogation claims, their "direct" claim is a fundamentally different legal claim from the typical insurer-against-wrongdoer claim that falls under the principle of subrogation. This direct claim is said to arise not only out of a tortfeasor's actions toward an insured, but also from its actions toward the insurance company (here the Funds) itself. The traditional subrogation principle holds that an "'insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding

amount to the assured's right of action against any other person responsible for the loss.'" *Great Am. Ins. Co.*, 575 F.2d at 1034 (quoting W. Vance, Vance on Insurance 787 n.2 (3d ed. 1951)). Here, the Funds are essentially claiming that they paid for more than "the property insured" (i.e., the health of fund participants) because the defendants caused the Funds to expend additional costs that would have been paid by the tobacco companies (through reduced revenues and tort damages) if they had not defrauded the Funds and conspired to cover up their wrongdoing.

As the Funds frame their direct injury argument: "Had defendants not undertaken their deceptive, fraudulent, and anticompetitive activity, the Trusts' trustees, administrators, and advisors could have taken counter-measures against smoking and smoking-related illness and would have commenced legal efforts much sooner and more effectively to impose the costs resulting from tobacco use on the tobacco companies." Appellants' Br. at 10. Plaintiffs' complaint sets out this theory as follows:

> Defendants' contract, combination, or conspiracy was and is for the express purpose and effect of restraining, suppressing and withholding information necessary to medical care researchers, providers, and payers, including Plaintiffs and members of the Class, so that the costs of health care for tobacco-related illnesses continue to be borne by health care providers and payers, such as Plaintiffs and members of the Class, [who] are injured in their business and property by, among other things, having to provide or pay for the health care costs of persons with tobacco-related diseases without being reimbursed by Defendants.

Compl. ¶ 256. Plaintiffs correctly observe that the District Court did not address this alleged "direct" injury, but as is clear from our discussion below, we do not find the directness of the Funds' alleged injury dispositive of whether they have stated a claim under either federal or state law.

II. Plaintiffs' Federal Claims

A. Introduction

Plaintiffs' federal claims are based on the antitrust laws and the RICO statute. In brief, they allege that defendants conspired to withhold certain information and products from the Funds, and fraudulently induced the Funds to reimburse smokers for illnesses caused by the tobacco companies' wrongdoing. We need not focus on many of the necessary elements of these claims, such as the details of the conspiracy and the fraud, whether the Funds (or others) reasonably relied on the fraud, the predicate acts for the RICO claims, etc. Rather, we focus on the issue of proximate cause, a necessary element for bringing both antitrust and RICO claims, and an element we find lacking in plaintiffs' case.

Given the Supreme Court's determination that the standing requirements for RICO and antitrust claims are similar, and that the standing analysis under these federal laws is drawn from common-law principles of proximate cause and remoteness of injury, we analyze the key remoteness issue for plaintiffs' federal claims under the rubric of standing doctrine. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992) (RICO); *Blue Shield v. McCready*, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) (antitrust).

As is clear from our discussion below, the key problem with plaintiffs' complaint is the remoteness of their alleged injury from the defendants' alleged wrongdoing. Remoteness is an aspect of the proximate cause analysis, in that an injury that is too remote from its causal agent fails to satisfy tort law's proximate cause requirement — a requirement that the Supreme Court has adopted for federal antitrust and RICO claims. *Cf. McCready*, 457 U.S. at 477 ("In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant [antitrust]

standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'"). By subsuming the proximate cause requirement under the concept of standing, the Supreme Court has acknowledged that a private plaintiff might validly plead (and even prove) that a defendant has committed an antitrust violation, but still lack standing to enjoin or remedy this violation if his own injury is too remotely connected to it. Therefore, in discussing whether plaintiffs have standing to bring their antitrust or RICO claims, we will focus on proximate cause in general and on remoteness in particular.

Plaintiffs' claims are largely grounded in allegations of fraud on the part of defendants. Therefore, we would normally focus initially, in addressing the federal claims in this case, on the RICO claims, which are predicated on alleged mail and wire fraud by the defendants. *See* Compl. ¶ 224(a). However, the Supreme Court has discussed proximate cause more expansively in the antitrust context, and has incorporated this discussion into its RICO jurisprudence. *See Holmes*, 503 U.S. at 268-70. We therefore begin our discussion of plaintiffs' federal claims with an analysis of the Court's holdings in the antitrust field.[4]

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[4] As noted above, the District Court also dismissed plaintiffs' complaint on the ground that the Funds have suffered no cognizable injury. *See Steamfitters*, 1998 WL 212846, at *2-3 (finding that any increased expenses due to smoking-related illnesses of fund participants "merely meant that the unions negotiated a greater level of contributions from the employers"). We seriously doubt that this was an appropriate basis for dismissing the complaint. The plaintiffs clearly could not go at will to the employers who funded their health plans for a replenishment any time they needed more money. Increased costs likely necessitated reduced expenditures in other areas, as well as reductions in the Funds' reserves. Cf. Amicus Br. of UMWA Combined Benefit Fund at 22 (noting that the Funds cannot "merely return to the inexhaustible well of employers' bank accounts when the spigot for health benefits runs dry"). Simply because they are not the ultimate source of the money used to pay for smoking-related illnesses does not mean that the Funds have suffered no legally cognizable injury.

The District Court also found that all of the Funds' claims are

B. Antitrust Standing: Remoteness and Proximate Cause

In adopting a proximate cause requirement for antitrust claims, the Supreme Court has explained that, despite the broad language and remedial purpose of the antitrust laws, "it is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *McCready*, 457 U.S. at 477. In discussing the requirements for proximate cause, the Court has repeatedly noted that "proximate cause is hardly a rigorous analytic tool." *Id.* at 477 n.13; *see also Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536-37 & n.34, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 964 (3d Cir. 1983) ("Because of the infinite variety of claims that arise under the antitrust statutes, [the Supreme Court] has refused to fashion a black-letter rule for determining standing in every case."). Therefore, the Court has emphasized that lower courts should avoid applying bright-line rules and instead should analyze the circumstances of each case, focusing on certain key factors.

1. *Blue Shield v. McCready*

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essentially subrogation claims and therefore could not be brought under the federal and state theories invoked in the complaint. *See Steamfitters*, 1998 WL 212846, at *1. Again, we do not necessarily agree with this conclusion. As noted supra Part I.B.2, the Funds' claims of direct injury are fundamentally different from a traditional insurer-against-wrongdoer subrogation claim. They are said to arise not only out of the wrongdoer's actions toward the insured, but also out of his actions directed at the insurer in attempting to avoid the consequences of his misdeeds.

We need not resolve these issues, however, for we conclude that the District Court correctly held that the Funds' alleged injuries are too remote from any wrongdoing by the defendants to be redressable through the RICO statute, the antitrust laws, or state common-law theories of recovery.

In *McCready*, the Court held that the primary factors for evaluating proximate cause in an antitrust action were: (1) "the physical and economic nexus between the alleged [antitrust] violation and the harm to the plaintiff" and (2) "more particularly, . . . the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy" under the antitrust laws. *McCready*, 457 U.S. at 478. In discussing these factors (and finding that the plaintiff in *McCready* had standing to assert a claim under the antitrust laws), the Court noted:

> The availability of [an antitrust] remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market. McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations . . . would be likely to cause.

Id. at 479 (emphases added) (omission in original) (internal quotations omitted). The Funds allege that the defendants' hiding of their knowledge of the dangers of smoking and conspiring to keep safer tobacco products from the market "was

the very means by which [the tobacco companies] sought to achieve [their] illegal ends" and the Funds' payment of extra costs "was a necessary step in effecting the ends of the alleged illegal conspiracy." Therefore, they argue, their claims fit precisely within the rule of *McCready*.

We disagree. Unlike the defendants in *McCready*, the tobacco companies could have achieved their alleged aims without the existence of the Funds or the relationship between the Funds and smokers. In *McCready*, psychiatrists allegedly conspired with Blue Shield to exclude psychologists from the psychotherapy market by persuading Blue Shield to reimburse subscribers for this service only when it was provided by a psychiatrist. The reimbursement scheme was both the alleged conspiracy and the cause of McCready's harm: McCready was a psychotherapy patient denied reimbursement for her treatment by a psychologist. If Blue Shield subscribers such as McCready did not exist, a conspiracy between psychiatrists and Blue Shield would never have come about (as it would have been ineffective to achieve the alleged aims of the conspiracy). *Cf. Gregory Mktg. Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 96-97 (3d Cir. 1986) (holding that plaintiff, a food broker for defendant manufacturer, had suffered no antitrust injury because it was not a consumer or competitor of defendant, and was not an "essential participant" in defendant's scheme to price-discriminate against certain retailers).

In contrast, the tobacco companies would have had ample reason to engage in a conspiracy to prevent safer tobacco products from coming on the market, regardless of the relationship between the Funds and smokers. The very existence of smokers would be a sufficient reason for such an alleged conspiracy. The fact that the Funds reimbursed smokers for their smoking-related illnesses might have made the conspiracy more profitable or allowed it to exist longer, but the relationship between the Funds and smokers was not "a necessary step in effecting the ends of the alleged illegal conspiracy."

It is for this reason that plaintiffs' reliance on *Prudential*

Insurance Co. of America v. United States Gypsum Co., 828 F. Supp. 287 (D.N.J. 1993), is also misplaced. In that case, which also included allegations of fraudulent acts intended to mislead consumers about the safety of defendants' product (asbestos), the district court denied defendants' motion for summary judgment on plaintiffs' RICO claims. The court noted that "the fraud scheme directly targeted entities like Prudential, [a real estate dealer,] for the fraud would not have been worth it if large real estate dealers did not continue to buy such buildings." *Id.* at 297. In addition, the plaintiffs "stood to keep the defendants' products valuable by continuing to buy buildings containing defendants' products." *Id.* In the present case, the tobacco companies' alleged fraud would still have been "worth it" if the Funds and other health care payers did not reimburse smokers for their illnesses.

In addition, the defendants' fraud in *Prudential* prevented the building purchasers from obtaining information about the dangers of asbestos — information that would have led them to not purchase buildings containing this product. In this case, however, even if the tobacco companies had not prevented health care payers from discovering the dangers of smoking, there is no claim that the Funds would have chosen to not insure smokers. The defendants' conspiracy in *McCready* and the defendants' fraud in *Prudential* would have been without purpose or effect if the plaintiffs in those cases did not use the services of the directly targeted parties, psychologists and building contractors, respectively. The same is not true in the present case.

2. *Associated General Contractors*

a. The Relevant Factors

Shortly after McCready was decided, the Supreme Court provided further guidance in this area in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) [*AGC*]. In

AGC, a union sued a contractors' association on antitrust grounds, alleging a conspiracy to force builders and contractors to use primarily nonunionized subcontractors. The court of appeals had framed the union's argument for antitrust standing (which it had accepted) in much the same way that the Funds frame their argument here: "In support of the Union's standing, the [court of appeals] reasoned that the Union was within the area of the economy endangered by a breakdown of competitive conditions, not only because injury to the Union was a foreseeable consequence of the antitrust violation, but also because that injury was specifically intended by the defendants." *Id.* at 525.

After discussing at length proximate cause principles likely incorporated by Congress into the Sherman Act in 1890, *see id.* at 530-34 & nn.20-25,[5] the Supreme Court outlined a number of

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[5] In addressing the key remoteness issue, the parties argue a good deal about the meaning of footnote 25 in *AGC*, but we think they place too much weight on the Court's citations therein to an 1882 treatise on damages. The relevant paragraph of the footnote reads as follows:

> In torts, a leading treatise on damages set forth the general principle that, "where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose." Thus, A, who had agreed with a town to support all the town paupers for a specific period, in return for a fixed sum, had no cause of action against S for assaulting and beating one of the paupers, thereby putting A to increased expense. Similarly, a purchaser under an output contract with a manufacturer had no right of recovery against a trespasser who stopped the company's machinery, and a creditor could not recover against a person who had forged a note, causing diminution in the dividends from an

factors to consider in the flexible antitrust standing analysis: (1) the causal connection between defendant's wrongdoing and plaintiff's harm; (2) the specific intent of defendant to harm plaintiff; (3) the nature of plaintiff's alleged injury (and whether it relates to the purpose of the antitrust laws, i.e., ensuring competition within economic markets); (4) "the directness or indirectness of the asserted injury"; (5) whether the "damages claim is . . . highly speculative"; and (6) "keeping the scope of complex antitrust trials within judicially manageable limits," i.e., "avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 537-38, 540, 542-44.[6]

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estate. 1 J. Sutherland, Law of Damages 55-56 (1882) (emphasis in original, footnote omitted).

AGC, 459 U.S. at 532-33 n.25. Contrary to defendants' contention, the Court appears to have quoted this excerpt from Sutherland as simply a "general principle" and not as the outer limits of possible antitrust liability. Further, while the first example cited appears to support the tobacco companies' argument on remoteness, the allegations here are more analogous to a situation in which A agreed to support all the town paupers and S, after assaulting and beating a number of the paupers, covered up his wrongdoing and affirmatively kept A from reducing its costs of supporting the injured paupers. While we still question whether, in Sutherland's view, A would have a cause of action against S under this scenario, it is certainly a closer question than that raised by the example in the excerpt.

On the other hand, plaintiffs place much weight on the qualifier at the end of the internally quoted language, i.e., "unless the wrongful act is willful for that purpose." Our view of the import of this qualifier, however, is not the same as theirs, as we do not think a sentence fragment in a single quotation in a Supreme Court footnote is sufficient to override the clear text of that opinion — text that squarely holds that "an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss." *Id.* at 537 (footnote omitted).

[6] We take these "factors" from *AGC*'s lengthy discussion of antitrust standing. However, our prior cases have at times distilled Supreme Court precedent in this area into a more succinct test: "To establish antitrust

b. Applying the AGC Factors

i. Causation and Intent

Although the first two factors — a causal connection and an intent to harm the plaintiff — were present in *AGC*, this was insufficient to give the plaintiff antitrust standing. *See AGC*, 459 U.S. at 537; *see also Merican*, 713 F.2d at 964 n.13 ("Claims that a defendant specifically intended to harm the plaintiff, however, are not of controlling significance. Although a defendant's improper motive may sometimes support a damages claim under § 4 [of the Clayton Act], it 'is not a panacea that will enable any complaint to withstand a motion to dismiss.'" (quoting *AGC*, 459 U.S. at 537)). Plaintiffs urge us to focus on the causal connection (proximate or otherwise) between the tobacco companies' wrongdoing and the injury to the Funds, as well as the companies' alleged specific intent to foist the costs of their wrongdoing onto the Funds. As in *AGC*, we do not find these factors to be dispositive on the issue of antitrust standing. *See also Gregory Mktg.*, 787 F.2d at 95 ("Neither causation in this but-for sense nor an allegation of improper motive is sufficient to 'enable any complaint to withstand a motion to dismiss.'" (quoting AGC, 459 U.S. at 537)).

What is more, for the reasons set forth in the margin, it is unclear whether there exists a causal connection (proximate or otherwise) between any antitrust wrongdoing on the part of the defendants and the Funds' alleged injuries of increased health

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standing a plaintiff must show both: 1) harm of the type the antitrust laws were intended to prevent; and 2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful." *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 429 (3d Cir. 1993). In other cases, we have extracted five relevant factors from *AGC*. *See, e.g., Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1165-66 (3d Cir. 1993).

care expenditures.[7] An agreement among competitors to

[7] It is unclear from plaintiffs' complaint precisely what antitrust wrongdoing they allege is connected to their own injuries. *See, e.g.*, Compl. ¶ 242 (alleging defendants engaged in the "anti-competitive restriction of product choice and suppression of product information," thereby "restricting consumer choice, and causing consumers to suffer tobacco-related illnesses"); *id.* ¶ 246 ("Defendants also conspired to eliminate competition among themselves in the research, development, production and marketing of alternative, higher quality, and safer cigarettes and tobacco products.").

A business's decision to not produce a product, simpliciter, is not a violation of the antitrust laws, and it is not clear whether even a concerted decision among all of the businesses in an industry to keep one of their new products from reaching consumers would be an antitrust violation. *Cf. Oahu Gas Serv., Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 369 (9th Cir. 1988) ("A line of 'product innovation' cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products."); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-46 (9th Cir. 1983). In *Foremost Pro*, the court observed that a business's decision to delay introducing a new product would not restrain competition, as consumers would still be able to choose among existing products by that business or its competitors. *See id.* at 545. The court went on to conclude:

> It is appropriate to emphasize that as a general rule, "any firm, even a monopolist, may . . . bring its products to market whenever and however it chooses." [*Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 286 (2d Cir. 1979)]. Without more, it is not unlawful for any competitor in any market to delay the introduction of a new product or an entire line of new products until, as plaintiff alleged in this case, the competition forces such introduction. In order to state a claim for relief under section 2 [of the Sherman Act], product introduction must be alleged to involve some associated conduct which constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market, rather than aggressive competition on the merits.

Id. at 545-46 (omission in original).

We do not decide here whether this reasoning holds true when competitors — rather than a single monopolist — agree to "delay the

suppress information on the dangers of their product might constitute an antitrust violation if the conspiracy artificially raised the price consumers were willing to pay for the product. Here, however, the plaintiffs do not allege (and could not plausibly allege) that consumers' paying higher prices for tobacco products injured the Funds. On the contrary, these higher prices more likely would have led fewer persons to purchase the products, thereby decreasing the costs (and injuries) to the Funds. Therefore, while there may be a causal relationship between the conduct of the defendants and the injuries alleged by the plaintiffs, we are uncertain that these injuries are connected to any conduct of the defendants that violates the antitrust laws. See supra note 7.

ii. Nature and Directness of Injury

In analyzing the third and fourth factors, the Court in *AGC* observed that the plaintiff union was neither a consumer (as the plaintiff in *McCready* was) nor a competitor within the market

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introduction of a new product or an entire line of new products," but it is at least unclear whether such an agreement would constitute an antitrust violation absent allegations that the delayed introduction of the product involved an attempt to artificially raise prices for existing products, exclude non-conspiring competitors from a market, or accomplish some other conventional anticompetitive effect. *See, e.g., United States v. Container Corp. of Am.*, 393 U.S. 333, 335-37, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969) (noting that, while an agreement to exchange price information would be a "conspiracy" under the Sherman Act, it would constitute an antitrust violation only if it restrained trade, by, for example, limiting or reducing price competition); *cf. American Tobacco Co. v. United States*, 328 U.S. 781, 809, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946) ("It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns."). While we do not decide whether an agreement among competitors to withhold a new product from a market would constitute an antitrust violation, we assume for the sake of assessing plaintiffs' antitrust standing that the conduct in which defendants allegedly engaged would constitute such a violation.

that allegedly had been restricted (i.e., the market for building subcontracts). Further, its alleged harm was indirect because it claimed that the defendants conspired to induce third parties to do business with nonunion contractors instead of union contractors, and the plaintiff union was harmed only because it had contracts with the latter and not the former. The Court concluded that "the Union is neither a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices." *AGC*, 459 U.S. at 540 n.44. This analysis inveighs against plaintiffs' position.[8] The Court's holding in *AGC* that the union did not have standing also undercuts the Funds' argument that the foreseeability of their injury strongly favors our finding that proximate cause exists here. *See* Appellants' Br. at 25. No doubt the defendants in *AGC* foresaw that their conspiracy favoring nonunion contractors would harm the unions that had contracts with the target of the conspiracy — unionized contractors. Yet this foreseeability was insufficient to overcome the remoteness of the union's injury from the defendants' wrongdoing.

Our analysis of the first four *AGC* factors counsels against recognition of the Funds' claims based simply on indirect cost increases from smoking-related illnesses. The Funds are not

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[8] The Funds contend that there is an exception to the general rule that an antitrust plaintiff be either a consumer or competitor of the defendant's. *See* Appellants' Br. at 42-45. It is true that, drawing on language from *McCready*, 457 U.S. at 483-84, we have sometimes expressed the injury requirement in terms of the harm being "inextricably intertwined" with the defendant's wrongdoing. *See, e.g., Gulfstream III Assocs.*, 995 F.2d at 429 (holding that plaintiff's injury may flow from defendant's wrongdoing if "there exists a 'significant causal connection' such that the harm to the plaintiff can be said to be 'inextricably intertwined' with the antitrust conspiracy" (citation to *McCready* and other cases omitted)). The simple invocation of this phrase, however, will not allow a plaintiff to avoid the fundamental requirement for antitrust standing that he or she have suffered an injury of the type — almost exclusively suffered by consumers or competitors — that the antitrust laws were intended to prevent.

consumers forced to pay higher prices for tobacco products or competitors harmed by defendants' ability to conceal the unsafe nature of their products. They are simply some of the many groups or individuals suffering the financial or medical repercussions of the decades-long marketing of a product that we now know is demonstrably unsafe. *Cf. Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 181 (3d Cir. 1997) ("If the injury is not of the requisite type, even though the would-be plaintiff may have suffered an injury as a result of conduct that violated the antitrust laws, he or she has no standing to bring a private action under the antitrust laws to recover for it.").

However, the Funds' claims of direct injury include allegations that they were in the market for safer tobacco products or for products that would reduce or prevent people from smoking. Therefore, these claims might meet the third factor from *AGC*. If the Funds were consumers in a market for information and products that would have reduced their expenditures (because they allegedly would have provided the information and products to their participants, some of whom would have smoked less and become less ill), their asserted injuries — as consumers — may be of the appropriate type.

The Funds' claims of direct injury might also meet the fourth factor from *AGC*, which focuses on the directness or indirectness of the alleged injury. Subsumed in the "directness" factor is also the issue of whether other, more directly injured parties could vindicate the policies underlying the antitrust laws: "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general." *AGC*, 459 U.S. at 542. While more directly injured parties existed in AGC (i.e., unionized subcontractors who were the target of the boycott), this is not necessarily the case here. Smokers can sue for personal injuries arising from smoking, but they are unlikely (or unable) to press

antitrust claims against the tobacco companies.

Although we acknowledge that plaintiffs' claims of direct injury appear, at least initially, to meet a number of the first four *AGC* factors, we question whether these direct injuries are necessarily more direct than the indirect injuries on which much of our discussion has focused. Under plaintiffs' direct theory, the tobacco companies' conduct aimed at the Funds induced the Funds to not take certain actions, which led to a greater incidence of smoking (and of smokers using more dangerous products), which led to more illness, which led to increased health care expenditures being borne by the plaintiffs. Although the alleged wrongdoing was more directly aimed at the Funds, the injury itself certainly was no more direct than the indirect injury that arose from the defendants' actions toward smokers.

In another union fund case, a district court focused on this alleged direct injury in partially denying the defendants' motion to dismiss. In that case, the court analogized the direct-injury claim to a hypothetical case in which a defendant fraudulently induced health funds into reimbursing participants for a dangerous medical procedure that then harmed these participants. *See New Jersey Carpenters Health Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 324, 332-33 (D.N.J. 1998). In such a case, the court believed, the funds would have a cause of action against the defendant for their economic damages caused by the fund participants' use of the procedure that the funds were wrongfully induced to cover.

We are not convinced, as the district court in *New Jersey Carpenters* was, that this hypothetical case presents a causation chain similar to the Funds' direct claim in the present case. First, in the hypothetical case, the defendant fraudulently induced the plaintiffs to spend money that redounded directly to defendant's benefit (i.e., the funds paid for the procedure that the defendant invented). In a sense, this is no different than a garden-variety fraud case in which the defendant hoodwinks the plaintiff into giving him "money for nothing." In the present case, plaintiffs' direct-injury claim is that the tobacco companies fraudulently

induced the Funds to not spend money (on safer-smoking or smoking-cessation products) that, if spent, would have diminished a separate revenue stream (i.e., smokers' purchase of tobacco products) for the defendants. We view this as an indirect connection. In addition, in the *New Jersey Carpenters* hypothetical, the fraud essentially induced the plaintiffs to enter into the relationship that caused their injury: The defendant induced the plaintiffs to "cover" the cost of defendant's faulty procedure. In the present case, the relationship that links the smokers' illnesses with the Funds already exists: The plaintiffs are already (apart from anything the tobacco companies do) "covering" the costs of the smokers' illnesses. The alleged fraud simply prevents them from reducing their expenses arising out of this preexisting relationship.

Our belief that the plaintiffs' direct claim comes no closer than their indirect claim to meeting the proximate cause requirement for antitrust standing is supported by the dearth of discussion of this allegedly unique claim in plaintiffs' complaint and brief to this Court. *See* Appellants' Br. at 21-22 (discussing "direct" injury); *id.* at 23-39 (discussing "indirect" injury); *see also infra* note 11 (noting minimal allegations of "direct" injury in complaint). At all events, as is clear from our extensive review of all of the *AGC* factors, we find that however plaintiffs characterize their claims — as direct or indirect — they necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part.

iii. Speculativeness of Damages and Trial Complexity

We find that *AGC*'s sixth factor does not militate against a finding of antitrust standing, as there is little danger of duplicative litigation[9] or complex apportionment of damages

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[9] The defendants complain that allowing the Funds to recover for their health care expenditures creates a danger of duplicative recovery in general (if not duplicative antitrust or RICO damages), because of Pennsylvania's

among various groups of plaintiffs.[10] However, the Funds' damages claims are quite speculative (and very difficult to measure), implicating *AGC*'s fifth factor. The Funds argue that damages may be easily calculated by aggregation and the application of statistical models. We question how easy this process would be. The Funds' alleged damages are said to arise from the fact that the tobacco companies prevented the Funds from providing smoking-cessation or safer-smoking information to their participants, some of whom would have allegedly quit smoking or begun smoking safer products, reducing their smoking-related illnesses, and thereby lowering the Funds' costs

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collateral source rule. *See, e.g., Johnson v. Beane*, 541 Pa. 449, 664 A.2d 96, 100 (Pa. 1995) ("The collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer."). The collateral source rule, however, is aimed at preventing a tortfeasor from benefitting from a third party's payment to the injured party. If the tortfeasor himself has already paid a portion of the injured party's damages, his own liability is correspondingly reduced. *See, e.g.*, Restatement (Second) of Torts § 920A(1) (1979). We are uncertain how this latter principle would apply when the tortfeasor pays a portion of the injured party's damages indirectly — i.e., through the third party payer's separate action against the tortfeasor for recovery of the third party's payments to the injured party. We need not predict whether Pennsylvania courts would apply the collateral source rule in this context, however, as we do not rely on defendants' invocation of the rule to support our holding.

[10] However, to the extent that Fund participants have not been reimbursed for certain health care expenditures or have suffered some other pecuniary loss as a result of the tobacco companies' alleged conspiracy, they could bring their own antitrust claims (as well as personal injury claims) against the defendants. For example, as we noted supra at 22-24 & note 7, it is possible that the defendants were able to artificially increase the price of their products by conspiring to hide a major defect in these products and by inducing consumers to buy their products through fraudulent claims regarding their safety. While we have questioned the Funds' ability to state a claim for higher priced tobacco products, consumers who paid these higher prices would possibly be able to bring an antitrust or RICO claim. Therefore, to some minimal extent at least, an apportionment of damages between health care payers and smokers might be necessary.

for reimbursing smokers' health care expenditures. In order to calculate the damages — i.e., the costs not lowered due to the antitrust conspiracy — the Funds must demonstrate how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less-dangerous products, how much healthier these smokers would have been if they had taken these actions, and the savings the Funds would have realized by paying out fewer claims for smoking-related illnesses.

It is apparent why the Funds argue that they can demonstrate all of this through aggregation and statistical modeling: it would be impossible for them to do so otherwise. *Cf. Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (affirming denial of class certification in statewide smokers' suit, because "addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification"). Yet we do not believe that aggregation and statistical modeling are sufficient to get the Funds over the hurdle of the *AGC* factor focusing on whether the "damages claim is . . . highly speculative." *AGC*, 459 U.S. at 542.

In some litigation contexts, there is a meaningful distinction between damages that are completely incapable of determination and those that are difficult to determine but are nonetheless measurable. In those contexts, if the latter is the case, aggregation and statistical modeling may be appropriate (though we need not decide that issue here) to allow plaintiffs to overcome the difficulty of proving the amount of damages. *Cf. Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996) (allowing use of aggregation and statistical analysis to determine compensatory damages). *But cf. Arch v. American Tobacco Co.*, 175 F.R.D. 469, 493 (E.D. Pa. 1997) (rejecting use of statistical evidence to overcome need to prove individual damages in putative class action). In the present context, however, a finding of antitrust standing must precede a finding of liability, which itself precedes the assessment of damages. Therefore, the fact

that "once liability is established, plaintiff's proof of damages will be evaluated under a more lenient standard," *Danny Kresky Enters. v. Magid*, 716 F.2d 206, 212 (3d Cir. 1983), does not eliminate from our analysis of the *AGC* factors the speculative (though potentially measurable) nature of plaintiffs' damages. This speculativeness strongly militates against plaintiffs' position.

iv. The *AGC* Factors Applied: Summary

Against this somewhat lengthy background, we can now summarize our review of the *AGC* factors in this case: First, some causal connection appears to exist between the conduct of the tobacco companies and the injury suffered by the plaintiff Funds — though we doubt that this connection links some antitrust wrongdoing with an antitrust injury. Second, plaintiffs have alleged, if barely, that the defendants' conspiracy specifically targeted them, though for the most part their complaint alleges that the plaintiffs were targeted along with "consumers, state and federal governments, medical and health care entities, and the public at large." Compl. ¶ 244.[11] Third, at least some aspect of the plaintiffs' alleged injury — their inability to obtain and use information on the dangers of smoking or on smoking-cessation methods — may be of the type that the antitrust laws are intended to prevent, i.e., the restriction of

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[11] Plaintiffs rely, both in attempting to distinguish their claims from traditional subrogation claims and in their efforts to avoid the import of *AGC*, on the alleged direct targeting of the Funds by the tobacco companies. Yet, we find scant mention of this direct targeting in plaintiffs' lengthy complaint and, when specifically asked by us to cite portions of the complaint that address this aspect of their case, plaintiffs could muster only three arguably relevant paragraphs (out of 317). See Appellants' Letter Br. of Jan. 25, 1999, at 2. While plaintiffs urged us, at oral argument, to remand so that they might amend their complaint to include more specific allegations of direct targeting by the defendants, *see* Tr. of Oral Argument at 18-19, we decline to do so, as the possibly inadequate pleading is not a factor in our holding.

consumer choices, which leads to increased costs for these consumers. However, the tenuous causal connection, the sketchy allegations of defendants' intent to target the Funds, and the minimal extent to which plaintiffs' injuries relate to the purposes of the antitrust laws are all substantially outweighed by the fourth *AGC* factor, the indirectness of the asserted injury.

The sheer number of links in the chain of causation that connect the defendants' suppression of information on the dangers of their products and withholding of safer tobacco products from the market to the Funds' increased expenditures are greater than in any case we can find in which this court or the Supreme Court has found antitrust standing. These alleged links include the following: (1) the tobacco companies engaged in a conspiracy to suppress information and withhold products from the market; (2) the Funds were prevented from informing their members about the dangers of smoking and the availability of less dangerous products; (3) smokers continued to smoke dangerous tobacco products that they would not have otherwise used (or would have used less); (4) smokers contracted more smoking-related illnesses; and, finally, (5) the Funds suffered increased expenses due to their reimbursement of smokers' health care costs.

As to the final two *AGC* factors, there is only a slight possibility of duplicative antitrust recoveries or problems apportioning antitrust damages, because smokers are unlikely to make their own antitrust claims based on increased health care expenditures. However, the Funds' damages claims are highly speculative and would entail complex calculations potentially involving numerous individuals not party to this case, i.e., Fund participants who do smoke or have smoked in the past.

The short of it is that, while we find that the plaintiffs' antitrust claims barely meet certain *AGC* factors, the fulfillment of these factors is greatly outweighed by the extremely indirect nature of the Funds' injuries and the highly speculative and complex damages claims. The tortured path that one must follow from the tobacco companies' alleged wrongdoing to the

Funds' increased expenditures demonstrates that the plaintiffs' claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out. *Cf. Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.").

What is more, in proposing a solution to the speculative nature of their damages — i.e., using aggregation and statistical modeling to measure damages — the Funds focus too far down the road to assist their case for standing: The task of accurately measuring damages can be approached only after a plaintiff has met the requirements for standing and has proven liability. While we do not doubt that the Funds have paid out more in health care expenditures than they would have in the absence of tobacco products, "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *McCready*, 457 U.S. at 477.

3. *Lower Lake Erie*

Our own precedent that provides the most support for plaintiffs' antitrust claim is *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993). In that case, the district court dismissed for lack of antitrust standing one of plaintiffs' claims that was based on a theory similar to that put forth by plaintiffs here. The plaintiffs, various steel manufacturers and transportation companies, alleged that certain railroad companies conspired "to preclude potential competitors from entering the market of lake transport, dock handling, storage and land transport of iron ore." *Id.* at 1151. The steel companies' claim that was dismissed was "based on the theory that had the conspiracy not delayed the use of self-unloading vessels, the steel companies would have paid vessel companies

a lower rate for lake transportation." *Id.* at 1154. The district court found that this claim failed, reasoning that "because the steel companies were only potential customers of non-conspiring competitors, (the vessel companies), damages could be ascertained only by speculating when the vessel companies would have begun using self-unloaders absent a conspiracy. Assessment of damages would also require additional conjecture related to the rates the private docks would have charged to handle the self-unloaders." *Id.*

After analyzing the factors from *AGC*, we disagreed with the district court's conclusion. First, we found that a direct causal relationship existed between the defendants' wrongdoing and the steel companies' alleged harm: "Delayed . . . introduction of the more efficient self-unloader . . . caused loss of the profits which would have been realized had the less costly transport system been in place," and "it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the railroad's agreement to thwart development of the less expensive technology." *Id.* at 1168.[12] This matches closely the Funds' theory in the present case: Delayed introduction of safer tobacco products caused higher costs than they would have faced had these products been allowed to enter the market, and it was health care payers who bore the brunt of the increased costs attributed to the tobacco companies' agreement to thwart development of safer tobacco products.

There is a key difference, however. In *Lower Lake Erie*, the use of more expensive unloaders — made necessary by the defendants' wrongdoing — caused a loss of profits for the

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[12] We also found that the steel companies had alleged injuries of the type the antitrust laws were intended to prevent and that the existence of other parties with similar injuries did not "diminish the directness of the steel companies' injury." *Lower Lake Erie*, 998 F.2d at 1168-69. Our ultimate holding was that the plaintiffs' damages, arising from the conspirators' exclusion of lower-cost means of transportation from the market, conferred antitrust standing on the steel companies.

plaintiffs without any intervening events.[13] The inability to use cheaper unloaders, in and of itself, caused the plaintiffs' damages. Here, the alleged conspiracy that delayed introduction of safer tobacco products only caused damages to the plaintiff Funds after working its way through another party (i.e., smokers) and at least two more steps: First, without safer products or information on smoking-cessation, smokers continued to smoke dangerous tobacco products. Next, these smokers became more ill than they otherwise would have without the tobacco companies' alleged conspiracy. Only at this point did the Funds allegedly suffer damages from the increased costs of the smokers' illnesses.

This distinction between *Lower Lake Erie* and the present case illustrates the most fundamental flaw in plaintiffs' claims. The injuries that they allegedly suffered from defendants' wrongdoing are simply too remote from that wrongdoing to be cognizable under the antitrust laws. The causal links that plaintiffs must connect in order to make their case are just too numerous and too speculative to meet the requirements of *AGC* and of the Supreme Court's and this court's other antitrust precedents.

C. RICO Claims: *Holmes v. SIPC*

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992), the Supreme Court held that its discussion of proximate cause and remoteness

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[13] We note another key difference between *Lower Lake Erie* and the present case. In *Lower Lake Erie*, the defendants did not simply conspire to delay their own introduction of a new product, as is alleged here. Rather, they engaged in archetypal antitrust conduct (price-fixing, boycotts, refusals to sell, etc.) in order to prevent other parties in the unloader market from introducing and using self-unloaders. *See Lower Lake Erie*, 998 F.2d at 1153-54. There was no question, therefore, that specific antitrust wrongdoing could be linked to specific antitrust injury. *Cf. supra* note 7.

in cases such as *McCready* and *AGC* applied to the analysis of proximate cause in RICO cases as well. *See Holmes*, 503 U.S. at 268; *see also McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) ("Significantly, antitrust standing principles apply equally to allegations of RICO violations."). Therefore, much (if not all) of what we have said above in our discussion of antitrust standing applies to the Funds' RICO claims. We discuss here, however, the specific requirements for stating a claim under RICO, to better explicate our reasons for finding that all of plaintiffs' claims must fail for being too remote and speculative.

In *Holmes*, the Court addressed the directness inquiry when it explained that "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. This was primarily because (1) the more indirect the injury, "the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to [defendant's wrongdoing], as distinct from other, independent, factors"; (2) allowing recovery by indirectly injured parties would require complicated rules for apportioning damages; and (3) direct victims could generally be counted on to vindicate the policies underlying the relevant law. *Id.* at 269-70.

1. Directness of the Injury

The plaintiff in *Holmes* alleged that the defendants had conspired to manipulate certain stock prices, which led to losses for brokers, which led to the brokers' inability to return investments of customers who had not bought the manipulated stock.[14] In the present case, the tobacco companies are in the

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[14] The plaintiff in *Holmes* was actually a private nonprofit corporation, the Securities Investor Protection Corporation ("SIPC"), which was required by federal law to reimburse the losses of certain investors. After paying for the

position of the stock manipulators in *Holmes*, while the smokers — the third party linking the plaintiffs and defendants — are in the same position as the brokers; the plaintiff Funds, who suffered a loss because of the harm that the defendants brought upon the third party, are in the same position as the brokers' customers who did not invest in the manipulated stock.[15] The Supreme Court in *Holmes* held that the causal connection between the nonpurchasing investors and the stock manipulators was too attenuated for the plaintiffs to have RICO standing.

The Court reasoned as follows: "If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets." *Id.* at 272-73. Applied to the present case, if the Funds are allowed to sue, the court would need to determine the extent to which their increased costs for smoking-related illnesses resulted from the tobacco companies' conspiracy to suppress health and safety information, as opposed

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losses of investors who had not invested in the defrauded securities, the SIPC asserted claims against those engaged in the fraud, as a subrogee. In discussing the causation chain in *Holmes*, we omit this additional link, as the SIPC stood in the investors' shoes for purposes of its claims.

[15] In the present case, the allegations of fraud and conspiracy directed at the Funds themselves might make the Funds more like the brokers' customers who did buy the manipulated stock. The Court in Holmes noted that these customers might have a RICO claim against the defendants, though it declined to reach this issue. *See Holmes*, 503 U.S. at 272 n.19. We note, however, that the defrauded investors in *Holmes* would have been able to allege direct injury from the fraud (i.e., their losses derived directly from the fraud, without any intervening links), while the Funds here, even if they were direct targets of the tobacco companies' fraud, did not suffer damages until this fraud prevented them from encouraging their participants to smoke less or not at all, which led to an increased incident of smoking-related illnesses, which in turn led to the Funds' increased expenses. *See supra* at 26-27.

to smokers' other health problems, smokers' independent (i.e., separate from the fraud and conspiracy) decisions to smoke, smokers' ignoring of health and safety warnings, etc.[16] As in *Holmes*, this causation chain is much too speculative and attenuated to support a RICO claim.

2. Apportionment of Damages and Vindication by Others

As noted above, the Court in *Holmes* expressed two further concerns (in addition to the directness factor) that supported its conclusion that nonpurchasing investors did not have standing: (1) the court would need to apportion treble damages between the brokers and the nonpurchasing customers, and (2) the brokers could vindicate the RICO claims themselves. *See id.* at 273. As we noted in our discussion of the Funds' antitrust claims, more directly injured parties, i.e., smokers, would be unlikely to bring federal claims against the tobacco companies for the same damages claimed by the Funds. Yet, as we also noted above, Fund participants who have not been fully reimbursed for their out-of-pocket costs that are traceable to defendants' alleged fraud and conspiracy might bring RICO or antitrust claims. Therefore, as in *Holmes*, a court adjudicating the Funds' RICO claims would need to consider the appropriate apportionment of damages between smokers and others such as the Funds who suffered economic losses as a result of the tobacco companies' alleged fraudulent acts.

It is true that the final concern — that another party could

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[16] While this complex determination militates against allowing the Funds to bring their remote claim, it addresses one of defendants' objections, that allowing the Funds (rather than smokers) to bring claims for smoking-related illnesses would nullify the defendants' traditional defenses, such as assumption of risk and comparative negligence. These defenses presumably would be available in the present case, in the sense that smokers' own wrongdoing (or ignoring of known risks) would be a factor in establishing and measuring the link between the tobacco companies' actions and the Funds' damages.

better vindicate the RICO claims — may not be as fully applicable to this case as to *Holmes* because the Funds allege that they suffered far greater economic damages than smokers themselves, many of whom were reimbursed for their direct pecuniary losses. Yet we are unconvinced that this distinction is sufficient to overcome the concerns about apportioning damages and, most fundamentally, the remoteness of the Funds' alleged RICO injuries from any wrongdoing on the part of the tobacco companies. *Cf. Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3d Cir. 1998) (finding RICO standing when defendant targeted plaintiff's contractual partner, plaintiff's injury arose from loss of that contract, and that contractual relationship "was a direct target of the alleged scheme — indeed, interference with that relationship may well be deemed the linchpin of the scheme's success").[17]

D. Summary of Federal Claims

At this point in contemporary history, there can be little doubt that the tobacco companies' products have caused smokers to contract certain illnesses and that the plaintiff Funds (and others) have borne some of the costs of these illnesses by reimbursing their participants for their health care expenditures. It is therefore quite possible that some of these health care providers

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[17] Because of our conclusion that plaintiffs' RICO and common-law fraud claims fail for lack of proximate cause, we need not reach defendants' alternative argument that these claims were not pled with sufficient particularity. See Fed. R. Civ. P. 9(b) ("In all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity."). We note, however, that plaintiffs' allegations are fairly general in nature and do not include "specific allegations as to which fraudulent tactics were used against" specific plaintiffs. *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998). On the other hand, we have cautioned that courts should "apply the rule with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants," *id.* at 658, as is alleged to have happened here.

and payers have had to cut back on their coverage of other medical problems in order to fund the costs of smoking-related illnesses, causing other Fund participants to pay out-of-pocket expenses they otherwise would not have paid. It also may be the case that unions and their members have been forced to accept lower wage increases or to forgo benefit improvements in order to achieve contract settlements with employers that included sufficient contributions to the Funds to pay for smoking-related illnesses. All of these parties — non-smoking Fund participants, unions, union members, employers — can claim to have suffered some injury arising out of the tobacco companies' conduct. At some point, however, the causal link between defendants' actions and the negative effects that eventually result is not proximate enough to meet the prudential requirements for antitrust or RICO standing. In this case, for the reasons set forth supra at 17-37, we believe that this necessary proximate-cause connection is missing.[18] Therefore, plaintiffs' federal claims based on alleged violations of the antitrust laws and the RICO statute were properly dismissed by the District Court.

III. Plaintiffs' State-Law Claims

The same principles that lead us to conclude that plaintiffs' antitrust and RICO claims were properly dismissed lead to the

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[18] There is arguably a tension between our decision here that the tobacco companies cannot be held liable for the damages suffered by entities that paid for smoking-related illnesses, and the fact that these same tobacco companies recently agreed to pay more than $ 200 billion to settle claims brought by attorneys general for the states' similar costs of their citizens' smoking-related illnesses. We note in this regard that an explanation for the putative tension may be found in any number of places, including state laws conferring standing and broad rights of recovery on states for wrongdoing against their citizens or their coffers, as well as the political power of governmental bodies — and the threat of legislative action — that is lacking in this case brought by private entities. We need not, of course, engage these matters here.

inevitable conclusion that their state-law claims must also fail.

A. Fraudulent Misrepresentation

While the District Court dismissed the Funds' remaining claims for the same reasons it found the antitrust and RICO claims wanting, i.e., lack of proximate cause and lack of cognizable injury, it also dismissed them for claim-specific reasons. The District Court found plaintiffs' state-law fraud claims too speculative to be cognizable. *See Steamfitters*, 1998 WL 212846, at *3. Just as we have found the link between defendants' alleged fraud — providing false information regarding the safety of their products — and plaintiffs' alleged injuries too attenuated to support a RICO claim, we also find the link too remote to support a common-law fraud claim. *See Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882, 889 (Pa. 1994) (requiring proximate cause as an element of fraudulent misrepresentation claim); *see also Crawford v. Pituch*, 368 Pa. 489, 84 A.2d 204, 207 (Pa. 1951) (holding that recoverable damages in a fraud case do not include those that are "consequential, speculative and even conjectural," but "only such as can be said to have been the immediate and proximate consequences of the deceit practiced upon the plaintiffs").[19] For

[19] We recently held that a common-law fraud claim might succeed despite the fact that the fraudulent misrepresentation was made to a third party (as is true in the present case for the Funds' claims of indirect injury). *See In re Orthopedic Bone Screw Prods. Liab. Litig.*, 159 F.3d 817 (3d Cir. 1998). In *Orthopedic Bone Screw*, we held that "the mere fact that the alleged fraudulent misrepresentation was made to [a third party] and not the plaintiffs does not necessarily preclude a finding of legally sufficient causation," *id.* at 826, when the plaintiffs alleged that fraud on the third party (a government agency) led to approval of products that then were used by plaintiffs and caused them injuries. *Id.* at 827. We also held that a misrepresentation claim is not necessarily precluded when the alleged injury arises from a third party's (and not the plaintiff's) reliance on defendant's misrepresentations. *See id.* at 828-29. These holdings, however, do not help plaintiffs in the present

this reason, we agree with the District Court that plaintiffs cannot maintain their state fraud claims.

B. Injunctive Relief

If the plaintiffs have antitrust standing for their damages claim, they almost certainly would have standing to seek injunctive relief, as the standard is lower for such a claim. *See McCarthy*, 80 F.3d at 856 (only proximate cause and "threatened loss or injury cognizable in equity" are required for injunctive relief under the antitrust laws). However, as we have detailed above, the necessary element of proximate cause is missing and therefore, just as plaintiffs lack standing to seek damages for their alleged injuries, they lack antitrust standing for equitable relief as well.[20]

C. Special Duty

The defendants maintain, and the District Court held, that a special-duty claim in Pennsylvania requires averments of physical injury. Whether or not this view is correct (and we take

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case. Even if the fact that the tobacco companies' misrepresentations were made primarily to smokers is not sufficient to defeat the common-law fraud claims, the harm that flowed from this fraud is much more attenuated than that in, in which the plaintiffs were directly harmed by their use *Orthopedic Bone Screw* of a product that was only available because of the defendants' misrepresentations to the third party.

[20] This court has yet to decide whether injunctive relief is available for a private party under RICO. *See Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989). Other circuits are split on this issue. *See Conkling v. Turner*, 18 F.3d 1285, 1296 & n.8 (5th Cir. 1994) (detailing circuit split). Given the lack of proximate cause in this case, the remoteness of plaintiffs' alleged injury from defendants' alleged wrongdoing, and our holding that plaintiffs' damages claims do not survive defendants' motion to dismiss, we need not reach this issue in the present case.

no position on it),[21] we conclude that plaintiffs' special-duty claim too must fail.

Special-duty claims arise most often in the context of the provision of public or commercial services. *See, e.g., Yates v. City of Philadelphia*, 134 Pa. Commw. 282, 578 A.2d 609, 611 (Pa. Commw. Ct. 1990) ("[A] special relationship is found only where an individual is exposed to a special danger and the authorities have undertaken the responsibility to provide adequate protection for him or her . . . ."); Restatement (Second) of Torts § 323 (1965) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."); *see also Morena v. South Hills Health Sys.*, 501 Pa. 634, 462 A.2d 680, 684 (Pa. 1983) (adopting Restatement section 323(a) as the applicable law in Pennsylvania).

Converting a company's marketing into a special undertaking to inform the public about the known risks of its products would subject every manufacturer that advertises its products to liability for a "special duty" created by such marketing, and that duty would be violated by every material omission in such advertising. We are unwilling to so dramatically extend the scope of liability for a state-law cause of action. *Cf. DeJesus v.*

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[21] The Pennsylvania Superior Court case relied on by the District Court and the defendants for the proposition that a special-duty claim requires allegations of personal physical injury did not so hold. *See Lower Lake Dock Co. v. Messinger Bearing Corp.*, 395 Pa. Super. 456, 577 A.2d 631, 635 (Pa. Super. Ct. 1990) (noting that prior Pennsylvania cases applying the special-duty rule did so only when there was physical injury or damages to property other than the allegedly defective one). We believe that the law on this issue is more uncertain in Pennsylvania than the defendants claim.

Liberty Mut. Ins. Co., 423 Pa. 198, 223 A.2d 849, 850 (Pa. 1966) (holding that no special duty arises from workers' compensation insurance company's "advertising material representing that it provides loss prevention service and safety counsel to its policyholders" when plaintiff-worker did not aver that "the advertisements were part of any contract or other legal obligation undertaken by [the insurance company] or that they adversely affected [the plaintiff]").[22] Finally, a special-duty claim is effectively a negligence cause of action, and therefore requires the element we have found missing from plaintiffs' case, proximate cause. *See Morena*, 462 A.2d at 684 & n.5 (noting that the plaintiff in a special-duty case must still prove the underlying elements of a negligence claim, including proximate cause).

D. Unjust Enrichment

Unjust enrichment is typically invoked in a quasi-contractual setting, when plaintiff seeks to recover from defendant for a benefit conferred under an unconsummated or void contract. *See, e.g., Zvonik v. Zvonik*, 291 Pa. Super. 309, 435 A.2d 1236, 1239-40 (Pa. Super. Ct. 1981); *cf. Meehan v. Cheltenham Township*, 410 Pa. 446, 189 A.2d 593, 595 (Pa. 1963) (noting that unjust enrichment is an equitable remedy, requiring for recovery that there be both "(1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied").

In the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched). As the Restatement of Restitution puts it:

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[22] Of course, a company's failure to inform consumers about the known risks of its products would be relevant to the duty-to-warn aspect of a products liability claim. *See* Restatement (Second) of Torts § 402A cmt. j (1965).

> The desirability of permitting restitution in [tort] cases is ordinarily not so obvious as in the cases where there has been no tort since the tortfeasor is always subject to liability in an action for damages and . . . the right to maintain an action for restitution in such cases is largely the product of imperfections in the tort remedies, some of which imperfections have now been removed.

Restatement of Restitution § 3 cmt. a (1937); *see also id.* at ch. 7 introductory note ("Actions of tort are ordinarily not restitutionary . . . . They are based primarily upon wrongdoing and ordinarily, through the payment of money, compensate the injured person for the harm suffered by him as a result of the wrongful conduct, irrespective of the receipt of anything by the defendant."). We can find no justification for permitting plaintiffs to proceed on their unjust enrichment claim once we have determined that the District Court properly dismissed the traditional tort claims because of the remoteness of plaintiffs' injuries from defendants' wrongdoing.[23]

For the foregoing reasons, the District Court's judgment dismissing plaintiffs' complaint in its entirety will be affirmed.

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[23] The District Court did not specifically address plaintiffs' strict liability, negligence, and breach-of-warranty claims, but these claims fail as well, for each requires a proximate connection between the defendants' conduct and the plaintiffs' injuries, a connection we find missing in this case. *See, e.g., Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186, 190 (Pa. 1997) ("To recover under [strict liability], a plaintiff must establish . . . that the defect was a proximate cause of the plaintiff 's injuries . . . ."); *Skipworth ex rel. Williams v. Lead Indus. Ass'n*, 547 Pa. 224, 690 A.2d 169, 172 (Pa. 1997) ("Pennsylvania . . . follows the general rule that a plaintiff, in order to recover, must establish that a particular defendant's negligence was the proximate cause of her injuries."); *AM/PM Franchise Ass'n v. Atlantic Richfield Co.*, 526 Pa. 110, 584 A.2d 915, 923 n.12 (Pa. 1990) ("As with all cases involving breach of warranty, the plaintiff is charged with the burden of proving that the defendant's breach is the proximate cause of the harm suffered.").

Appendix

Government Bodies as Plaintiffs

Arizona v. American Tobacco Co., No. CV-96-14769 (Ariz. Super. Ct. May 27, 1997) (denying motion to dismiss)

Idaho v. Philip Morris, Inc., No. CV-OC-97-03239 *D (Idaho Dist. Ct. Sept. 2, 1998) (denying motion to dismiss consumer protection claims, but dismissing antitrust, nuisance, and conspiracy claims)

Illinois v. Philip Morris, Inc., No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997) (denying motion to dismiss state antitrust, negligence, and civil conspiracy claims, but dismissing special duty, nuisance, and unjust enrichment claims)

Indiana v. Philip Morris, Inc., No. 49D07-9702-CT-003236 (Ind. Super. Ct. July 23, 1998) (dismissing conspiracy, antitrust, unjust enrichment, indemnity, assumed duty, criminal mischief, and nuisance claims)

Iowa ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401 (Iowa 1998) (affirming dismissal of deception, special duty, and indemnity claims)

County of Los Angeles v. R.J. Reynolds Tobacco Co., No. 707651 (Cal. Super. Ct. Dec. 23, 1997) (dismissing breach of warranty, fraud, strict liability, and negligence claims with leave to amend), petition for review granted, No. S068747, 1998 Cal. LEXIS 2475 (Cal. Apr. 22, 1998)

Maryland v. Philip Morris, Inc., No. 96122017, 1997 WL 540913 (Md. Cir. Ct. May 21, 1997) (denying motion to dismiss consumer protection and antitrust claims, but dismissing unjust enrichment, special duty, fraud, breach of warranty, negligence,

strict liability, and conspiracy claims with leave to amend)

City & County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130 (N.D. Cal. 1997) (dismissing RICO, negligent misrepresentation, special duty, warranty, and unjust enrichment claims with leave to amend), and No. C-96-2090 DLJ, 1998 WL 230980 (N.D. Cal. Mar. 3, 1998) (denying motion to dismiss fraud and certain special duty claims, but dismissing other special duty claims)

Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) (denying motion to dismiss RICO claims, but dismissing antitrust, unjust enrichment, and nuisance claims)

Washington v. American Tobacco Co., No. 96-2-15056-8 SEA, 1996 WL 931316 (Wash. Super. Ct. Nov. 19, 1996), and 1997 WL 714842 (Wash. Super. Ct. June 6, 1997) (denying motion to dismiss state antitrust claims, but dismissing special duty and unjust enrichment claims)

Union Funds as Plaintiffs

Hawaii Health & Welfare Trust Fund for Operating Eng'rs v. Philip Morris, Inc., No. 97-00833 SPK (D. Haw. Jan. 25, 1999) (dismissing RICO, antitrust, false advertising, and special duty claims)

International Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 19308, __ F. Supp. 2d __, Nos. 97-C-8113 & -8114, 1998 WL 849528 (N.D. Ill. Dec. 1, 1998) (dismissing antitrust, special duty, strict liability, negligence, breach of warranty, fraud, unjust enrichment, and conspiracy claims)

Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 771 (N.D. Ohio 1998) (denying motion to

dismiss RICO, antitrust, and conspiracy claims)

Kentucky Laborers Dist. Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc., 24 F. Supp. 2d 755 (W.D. Ky. 1998) (denying motion to dismiss some RICO and deceit claims, but dismissing other RICO claims and antitrust, fraud, special duty, and unjust enrichment claims)

Laborers & Operating Eng'rs Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc., No. CIV 97-1406 PHX SMM (D. Ariz. Feb. 10, 1999) (dismissing RICO, antitrust, fraud, assumed duty, and unjust enrichment claims)

Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 7 F. Supp. 2d 277 (S.D.N.Y.) (denying motion to dismiss fraud, special duty, and RICO claims, but dismissing unjust enrichment and antitrust claims), interlocutory appeal granted, 7 F. Supp. 2d 294 (S.D.N.Y. 1998), appeal docketed, No. 98-7944 (2d Cir. argued Feb. 4, 1999)

National Asbestos Workers Med. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 321 (E.D.N.Y. 1998) (denying motion to dismiss RICO, unjust enrichment, indemnity, and assumed duty claims)

New Jersey Carpenters Health Fund v. Philip Morris, Inc., 17 F. Supp. 2d 324 (D.N.J. 1998) (denying motion to dismiss certain fraud and RICO claims, but dismissing antitrust, special duty, and unjust enrichment claims)

New Mex. & West Tex. Multi-Craft Health & Welfare Trust Fund v. Philip Morris, Inc., No. CV-97-09118 (N.M. Dist. Ct. Dec. 24, 1998) (dismissing all claims)

Northwest Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc., No. C97-849WD (W.D. Wash. Dec. 23, 1998) (denying motion to dismiss)

Operating Eng'rs Local 12 Health & Welfare Trust v. American Tobacco Co., No. BC 177968 (Cal. Super. Ct. July 9, 1998) (dismissing strict liability, special duty, breach of warranty, restitution, and unjust enrichment claims without leave to amend, and dismissing fraud and conspiracy claims with leave to amend)

Operating Eng'rs Local 324 Health Care Fund v. Philip Morris, Inc., No. 97-741291 CZ (Mich. Cir. Ct. Feb. 12, 1999) (dismissing all claims)

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 17 F. Supp. 2d 1170 (D. Or. 1998) (dismissing antitrust, RICO, consumer protection, unjust enrichment, indemnity, assumed duty, and conspiracy claims)

Seafarers Welfare Plan v. Philip Morris, Inc., 27 F. Supp. 2d 623 (D. Md. 1998) (dismissing RICO, antitrust, tort, consumer protection, and unjust enrichment claims)

Southeast Fla. Laborers Dist. Health & Welfare Trust Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 5440, No. 97-8715-CIV-RYSKAMP, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998) (dismissing fraud, special duty, unjust enrichment, RICO, and antitrust claims)

Stationary Eng'rs Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc., 1998 U.S. Dist. LEXIS 8302, No. C-97-01519 DLJ, 1998 WL 476265 (N.D. Cal. Apr. 30, 1998) (denying motion to dismiss negligent breach of special duty claim, but dismissing fraud claims with leave to amend, and dismissing RICO, antitrust, intentional breach of special duty, unfair trade, and unjust enrichment claims without leave to amend)

Steamfitters Local Union No. 420 Welfare Fund v. Philip

Morris, Inc., 1999 U.S. App. LEXIS 5624, __ F.3d __, No. 98-1426 (3d Cir. Mar. 1999) (affirming dismissal of RICO, antitrust, fraud, special duty, unjust enrichment, strict liability, negligence, and breach of warranty claims)

Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 21 F. Supp. 2d 664 (E.D. Tex. 1998) (dismissing RICO, antitrust, tort, breach of warranty, and unjust enrichment claims)

West Va. Laborers' Pension Trust Fund v. Philip Morris, Inc., No. 3:97-0708 (S.D. W. Va. Aug. 12, 1998) (denying motion to dismiss)

West Va.-Ohio Valley Area I.B.E.W. Fund v. American Tobacco Co., No. 2:97-0978 (S.D. W.Va. Aug. 11, 1998) (denying motion to dismiss)

Other Health Care Payers as Plaintiffs

Minnesota v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996) (affirming denial of motion to dismiss state antitrust, consumer protection, and equitable claims, but dismissing tort claims)[24]

Regence Blue Shield v. Philip Morris, Inc., No. C98-559R, 1999 U.S. Dist. LEXIS 1820 (W.D. Wash. Jan. 6, 1999) (dismissing RICO, antitrust, fraud, special duty, unjust enrichment, and conspiracy claims)

Williams & Drake Co. v. American Tobacco Co., No. 98-553 (W.D. Pa. Dec. 21, 1998) (dismissing RICO, antitrust, consumer protection, fraud, special duty, indemnity, and unjust enrichment

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[24] Although the State of Minnesota is the nominal plaintiff in this case, the state supreme court's decision addressed only those claims brought by Blue Shield.

claims brought by self-insured employer)

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, ET AL.

v.

PHILIP MORRIS, INCORPORATED, ET AL.

Civil Action No. 97-5344

United States District Court for the
Eastern District of Pennsylvania

1998 U.S. Dist. LEXIS 5951

April 22, 1998

Fullam, Sr. J:

The named plaintiffs are a group of seven union welfare funds ("the Funds"), acting on behalf of themselves and a class consisting of all other union welfare funds in Pennsylvania. They have brought this action against eight major tobacco companies, four public relations firms and trade associations which allegedly provide lobbying services for the tobacco industry. Plaintiffs seek damages measured by the increased health benefits liabilities the Funds have incurred because of tobacco-related illnesses suffered by their participating union members. They also seek injunctive relief to require the defendants to finance certain remedial efforts in the future.

Plaintiffs' complaint asserts claims for RICO violations (Counts I and II), violations of the Sherman Antitrust Act (Count III), claims based upon alleged fraud and concealment (Count IV), claims for breach of a special duty (Count V) and claims for unjust enrichment (Count IX). The complaint also included claims based upon strict liability (Count VI), negligence (Count VII) and breach of warranties (Count VIII), but plaintiffs have now expressed an intention to withdraw this latter group of

claims" "without prejudice."

The defendants have filed a motion to dismiss the entire complaint, and the parties have agreed that, until this motion is decided, all other aspects of the litigation will be held in abeyance.

Plaintiffs' encyclopedic complaint extends to 115 pages, and includes 317 paragraphs. It traces the entire history of the marketing of cigarettes and other tobacco products in this country, from 1881 to date, and charges the defendants with a lengthy catalogue of malfeasances in their efforts to promote harmful tobacco consumption, to mislead the public about the dangers of smoking, to suppress research which demonstrated the causal relationship between smoking and various diseases, and to avoid developing a safer cigarette product. Plaintiffs further allege that, because of defendants' successful efforts to conceal their wrongdoing, all applicable statutes of limitation have been tolled until "quite recently"; thus, apparently, plaintiffs seek to recover all sums which they have expended for medical expenses associated with treating tobacco-related illnesses, from the inception of each of the plaintiff Funds to date.

In support of their motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), defendants mount various arguments which apply to all counts of the complaint, and other arguments which address certain individual counts. These arguments will be addressed in that order.

I. Issues common to all counts of the Complaint

A. Causation — proximate or remote?

Accepting as true all of the factual averments of plaintiffs' complaint, the defendants' activities have directly injured individual workers, causing them to incur medical expenses which have been paid by the plaintiffs. But, as the defendants correctly point out, the general rule has long been established that one who pays the medical expenses of an injured party does

not have a direct claim against the tortfeasor who caused the injury. *See e.g., Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532 n.25, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); *United States v. Standard Oil Company of California*, 332 U.S. 301, 314, 67 S. Ct. 1604, 1611, 91 L. Ed. 2067 (1947). The medical expenses incurred in treating an injury or illness caused by a tortfeasor are an integral part of the claim of the injured party against the tortfeasor, and cannot be separately asserted by the payor, except perhaps by way of subrogation.

In the present case, plaintiffs expressly disclaim any intention to assert a subrogation claim — presumably, among other reasons, to avoid the need to identify and prove the thousands of individual cases involved. Plaintiffs also concede that, if the defendants' liability were predicated upon negligence concepts, the damages sustained by plaintiffs would not be regarded as having been proximately caused by the defendants' conduct, but rather would be too remote and indirect. They argue, however, that these causation arguments are not applicable to their RICO, fraud, and other claims asserting intentional wrongdoing on the part of the defendants.

I am not persuaded that, on the issue of proximate cause, there is any significant difference among the various kinds of claims asserted in this case. I need not dwell upon this issue, however, because I conclude that all of plaintiffs' claims suffer from an even more fundamental flaw, namely, the fact that plaintiffs have not suffered any cognizable damages.

As the complaint carefully points out, all of the plaintiffs are non-profit, tax-exempt corporations. The funds which they use to pay the medical expenses of their members are obtained from the members' employers, through collective bargaining negotiations. Plaintiffs assert that the money in question really belongs to the workers, because the employers'' contributions to the funds really constitute a payment of a portion of the employees' wages.

But whether the contributions are properly attributed to the employer or the participating workers, it is clear that plaintiffs' own economic interests were not affected by the payments. The fact that the medical costs paid out of these funds increased because of defendants' wrongdoing caused no harm to plaintiffs; it merely meant that the unions negotiated a greater level of contributions from the employers.

Another appropriate analytical approach is to analogize this situation to that of a life insurance company. No one would seriously suggest that a life insurance company which pays the policy proceeds because its insured was killed could successfully sue a tortfeasor for causing the death. This is not only because any such claim would be entirely indirect and remote, but because the insurance company's premium structure is predicated upon actuarial assumptions and predictions concerning mortality rates of populations; the death of individual policyholders is precisely the risk the company agreed to assume. A tortfeasor cannot be held liable for merely providing partial fulfillment of actuarial predictions.

Plaintiffs' reliance upon the continued pendency of the various lawsuits brought by state attorneys general or other governmental entities to recover increased Medicaid disbursements attributable to tobacco-related illnesses, such as *State of Minnesota, et al. v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996), is misplaced. In all those cases (the numerous unreported decisions are cited in plaintiffs' initial brief at page 14, and are collected in plaintiffs' appendix, but will not be listed here), the plaintiffs were the entities which actually paid the increased medical costs from their own funds. In our case, plaintiffs are merely handling the payments with money provided by others, and have no genuine stake in the matter.

It should be noted that a reduction of the medical costs payable by plaintiffs would not inure to plaintiffs' benefit. The money in their hands, can only be used to pay benefits on behalf of others, and, since all are non-profit entities, plaintiffs cannot claim to have suffered any economic loss in the form of lost

profits. I therefore conclude that, as to all counts of the complaint, the complaint fails to set forth claims upon which relief can be granted.

B. Additional Issues

1. Antitrust Claims

Irrespective of the correctness of the conclusions thus far expressed, it is clear that Count III, which charges violations of the Sherman Act, 15 U.S.C. § 1, must be dismissed. Plaintiffs do not have antitrust standing, and they allege no injury of the sort the antitrust laws were designed to prevent.

2. Fraud, Misrepresentation and Concealment

Count IV is vulnerable to dismissal for the further reason that the defendants are not alleged to have made any representations to the plaintiffs, as distinguished from the general public. Moreover, the only form of reliance alleged in the complaint is the assertion that, because the defendants misrepresented the true characteristics of tobacco and concealed the dangers of smoking, plaintiffs were lulled into inaction, whereas, if they had known what the defendants knew and should have disclosed, they might have been able to prevent or reduce tobacco-related diseases among their participants. In my view, claims based on this theory are entirely too speculative to be taken seriously.

3. Injunctive Relief

Plaintiffs seek to compel the defendants to institute remedial measures to educate the participants in plaintiffs' funds, and the public generally, about the dangers of tobacco; to furnish nicotine patches or other devices to assist smokers to stop smoking, to develop safer cigarettes, etc. While plaintiffs' apparent desire to be helpful to its members and to society in

general is commendable, plaintiffs simply do not have legal standing to advance such claims, which really belong to the individuals affected. Moreover, all such matters are within the province of Congress or the state legislatures. Judges are not authorized to legislate, by issuing injunctions or otherwise.

4. Failure to Perform a Special Duty

In Count V, the plaintiffs allege that, through various advertising statements, the defendants assumed a special duty "to protect the public health and a duty to those who advance the public health," which obliged the defendants to cooperate with public health officials, assist in research efforts into the health effects of smoking, disclose complete and accurate information about the health effects of smoking, etc. Such claims have received short shrift in the reported decisions. *See Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1157 (E.D. Pa. 1987) (advertising statements cannot give rise to a special duty); *Lower Lake Dock Co. v. Messinger Bearing Corp.*, 395 Pa. Super. 456, 577 A.2d 631, 635 (Pa. Super. Ct. 1990) ("special duty" theory applies only to physical harm, not economic injury). Indeed, the tort alleged in this count is defined in Restatement (Second) Torts §§ 323 and 324A as being restricted to "physical harm" which is defined as "physical impairment of the human body, or of land and chattels." Count V must therefore be dismissed for this additional reason.

5. Unjust Enrichment

Finally, Count IX, which alleges a claim for unjust enrichment, is also subject to dismissal. Plaintiffs allege that, by paying medical expenses caused by tobacco-related illnesses, they relieved defendants of their obligation to pay such medical costs, and therefore defendants have been unjustly enriched to the extent of those payments. In my view, this is simply a subrogation claim expressed in different language. Plaintiffs

have disavowed any wish to assert subrogation claims, and, as discussed above, such claims cannot be asserted independently of the individual claims for personal injuries. It should also be noted that in states which preclude a tortfeasor from reducing damage awards by showing that plaintiff has received payment from a "collateral source," there would be an unacceptable risk of double payment if plaintiffs were permitted to pursue subrogation independently.

C. Defendants' Alternative Motion to Dismiss

Defendants have filed a separate additional motion to dismiss the complaint, for failure to join indispensable parties; in essence, defendants are merely reiterating that plaintiffs have no valid claims of their own which can be asserted independently of the claims of others, or that plaintiffs' lack standing to sue. The alternative motion need not be separately addressed.

D. Conclusion

Counsel for both sides are to be commended for their diligence, and for the exceptionally high quality of their briefs and pleadings. In the final analysis, however, the liability of the defendants for harm caused by their products and activities cannot be addressed or resolved in this lawsuit. If such claims are to be brought, they must be brought by the injured smokers or their survivors, or by state governments or other entities which actually suffered direct economic loss attributable to the defendants.

Since the obstacles identified above cannot be overcome by amending the complaint, leave to amend will not be granted. The complaint will be dismissed with prejudice, but, of course, without prejudice to plaintiffs' subrogation rights, if any.

Inasmuch as class certification has not yet been sought or granted, and putative class members have not been notified of this litigation, the dismissal now ordered applies only to the

named plaintiffs; the class allegations will be stricken.

ORDER

AND NOW, this 22nd day of April, 1998, IT IS ORDERED:

1. The class allegations are STRICKEN from the complaint.

2. Plaintiffs' complaint is DISMISSED in its entirety, WITH PREJUDICE.

3. The dismissal now ordered is WITHOUT PREJUDICE to plaintiffs' subrogation rights, if any, which may be asserted in litigation which may be brought on behalf of persons directly injured by defendants' products or activities.

4. The Clerk is directed to close the file.

John P. Fullam, Sr. J.

Appendix C

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND; INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL NO. 21 WELFARE FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 98, HEALTH & WELFARE FUND; COMPOSITION ROOFERS UNION LOCAL 30 COMBINED HEALTH & WELFARE FUND; LABORERS' DISTRICT COUNCIL BUILDING AND CONSTRUCTION HEALTH AND WELFARE FUND; CARPENTERS HEALTH & WELFARE FUND OF PHILADELPHIA AND VICINITY; CEMENT MASON'S UNION LOCAL NO. 592, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS,

v.

PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES P.L.C.; LORILLARD TOBACCO COMPANY, INC.; LIGGETT & MYERS INC.; THE AMERICAN TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; THE COUNCIL FOR TOBACCO RESEARCH — U.S.A., INC.; THE TOBACCO INSTITUTE, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC., APPELLEES.

No. 98-1426

United States Court of Appeals for the Third Circuit

Present: BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, AND ROSENN,[1] *Circuit*

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[1]As to panel rehearing only.

Judges.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/S/
Chief Judge

Dated: April 29, 1999

Appendix D

15 U.S.C. § 15: Suits by persons injured.

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —.

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

18 U.S.C. § 1964: Civil remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Nos. 99-545, 99-642, 99-791

Supreme Court, U.S.
FILED
NOV 23 1999

IN THE

Supreme Court of the United States

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, ET AL.,

Petitioners,

—v.—

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (99-545)

OREGON LABORERS-EMPLOYERS HEALTH & WELFARE FUND, ET AL.,

Petitioners,

—v.—

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (99-642)

(*Caption continued on inside front cover*)

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November 23, 1999

LABORERS LOCAL 17 HEALTH AND BENEFIT FUND, ET AL.,

Petitioners,

—v.—

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (99-791)

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QUESTION PRESENTED*

Respondents submit that the following question more accurately reflects the fundamental legal defect the Courts of Appeals found in the plaintiffs' claims:

> Did the three Courts of Appeals in these cases correctly hold that the plaintiff union funds' RICO and federal antitrust claims were barred because the funds' alleged injury — payment of medical expenses to treat personal injuries suffered by their individual participants allegedly caused by smoking — was derivative of the personal injuries of the participants, and thus too remote and indirect as a matter of law to permit recovery in "direct" actions brought by the union funds?

The funds' claims also suffer from multiple additional defects which provide independent grounds for affirming the decisions of the Courts of Appeals. *See* p. 19n.*, *infra*.

The *Laborers Local* and *Oregon Laborers* Petitions also include questions concerning the availability of injunctive relief under RICO, but, as is discussed at pp. 20-22, *infra*, it is misleading for Petitioners to assert that these cases "present" these questions, and, in any event, these questions do not warrant the grant of *certiorari*.

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* In communications with the Clerk's Office, Respondents have been advised that they may submit a consolidated opposition to the Petitions for *certiorari* in *Steamfitters* v. *Philip Morris*, No. 99-545, *Oregon Laborers* v. *Philip Morris*, No. 99-642, and *Laborers Local* v. *Philip Morris*, No. 99-791. Citations herein to these Petitions are in the form "Stm. Pet.," "OL Pet.," and "LL Pet.," respectively.

LIST OF PARTIES

Appellees below in 99-545:

Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
(including as successor by merger to
The American Tobacco Company, Inc.)
B.A.T Industries P.L.C.
Lorillard Tobacco Company
Liggett & Myers, Inc.
United States Tobacco Company
The Council for Tobacco Research-U.S.A., Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

Appellees below in 99-642:

Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
(including as successor by merger to
The American Tobacco Company, Inc.)
British American Tobacco (Investments) Limited
(formerly known as British-American
Tobacco Company Limited)
Lorillard Tobacco Company
Liggett Group, Inc.
United States Tobacco Company
The Council for Tobacco Research-U.S.A., Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

Appellants below in 99-791:

Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
(including as successor by merger to
The American Tobacco Company, Inc.)
Lorillard Tobacco Company
Liggett & Myers, Inc.
United States Tobacco Company
The Council for Tobacco Research–U.S.A., Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.)

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company) has the following parent corporations:

B.A.T Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc. UK/US
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Limited
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent British American Tobacco (Investments) Limited ("BATCo") (formerly known as British-American Tobacco Company Limited) has the following parent corporations:

British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
B.A.T Industries p.l.c.
British-American Tobacco (Holdings) Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATCo's stock.

Respondent Lorillard Tobacco Company, incorrectly named in the Petitions as Lorillard Tobacco Company, Inc., has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Respondent United States Tobacco Company has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of United States Tobacco Company's stock.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Respondent The Tobacco Institute, Inc. ("TI") has no parent corporations. There are no publicly held companies that own 10% or more of TI's stock.

Respondent Hill & Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPP International Holdings, Inc.
WPPIH Two, Inc.
WPP Luxembourg S.ARL
WPP Group plc
Ogilvy Group Inc.
J. Walter Thompson Company

WPP Group plc is the only publicly held company that owns 10% or more of Hill & Knowlton, Inc.'s stock.

Respondent Smokeless Tobacco Council, Inc. ("STC") has no parent corporations. There are no publicly held companies that own 10% or more of STC's stock.

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JURISDICTION

All three Petitions include precisely the same assertions concerning jurisdiction in the courts below. *See* Petitions at 1. However, the grounds for jurisdiction Petitioners asserted in the district courts were not all identical. In addition, in *Laborers Local*, the Court of Appeals took jurisdiction pursuant to 28 U.S.C. § 1292(b), not § 1291. *See* 7 F.Supp.2d 294 (certifying order); Order (2d Cir. July 14, 1998) (granting leave to appeal) (LL Pet. 54a, 58a).

STATEMENT

In all three cases Petitioners (union health and welfare funds) are seeking "to recover money expended ... to provide medical treatment to their participants and beneficiaries who have suffered and are suffering from tobacco-related illnesses." *Laborers Local* Compl. ¶ 7 (LL Ct. App. JA41-42).* *See also Steamfitters* Compl. ¶ 7 (Stm. Ct. App. JA12) (same allegation); *Oregon Laborers* Compl. ¶ 6 (OL Ct. App. Excpt. CR120,p.5) (plaintiffs "seek to recover the tobacco-related benefit costs incurred by them"). As all three Courts of Appeals have held — unanimously — in the cases at bar, such claims by medical expense payors for recovery of money expended to treat injuries incurred by others must be dismissed as a matter of law because the injury alleged is a remote, indirect and derivative consequence of the personal injuries of the individual smokers and thus is not proximately caused by defendants' alleged acts. *See* pp. 2-3, 6-10, *infra*.

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* Citations in the form "LL Ct. App. JA__" and "Stm. Ct. App. JA__" are to the Joint Appendices submitted to the Second Circuit in *Laborers Local* and to the Third Circuit in *Steamfitters*, respectively. Citations in the form "OL Ct. App. Excpt. __" are to Plaintiffs-Appellants' Excerpts of Record submitted to the Ninth Circuit in *Oregon Laborers*. Respondents will provide the Court with copies of the materials cited (or any other part of the records below) should the Court so request.

Petitioners devote pages to allegations of defendants' wrongdoing; many of these allegations do not even appear in the complaints in the cases at bar, but are instead taken from *other* sources. These allegations — which defendants would have contested had these cases proceeded beyond Rule 12(b)(6) motions — do not in any way alter the legal bar correctly found dispositive by all three Courts of Appeals.*

REASONS FOR DENYING THE WRIT

The decisions below are correct and do not conflict with any decisions of other Courts of Appeals, decisions of this Court, or decisions from state courts of last resort. Review by this Court is not warranted.

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

Four Courts of Appeals have to date considered claims by plaintiff union funds against tobacco companies to recover medical expenses paid to treat personal injuries of fund participants allegedly caused by smoking. *All four* Courts of Appeals have *unanimously* and correctly held that such claims must be dismissed because the injury alleged is remote, indirect and derivative, and the complaints therefore failed to allege an injury proximately caused by defendants' alleged wrongdoing. Thus, in the three of these four cases that are the subject of the present Petitions:

- The Second Circuit unanimously held that "the economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by plan participants and therefore too remote as a matter of law," and directed the district court to dismiss the

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* Petitioners' Statements contain many other errors, including various inaccurate characterizations of the opinions of the courts below. Erroneous assertions of law are addressed *infra*.

complaint. *Laborers Local* v. *Philip Morris*, 191 F.3d 229, 244 (LL Pet. 25a) (2d Cir. 1999), *r'hg and r'hg en banc denied* (Aug. 6, 1999). Rehearing *en banc* was denied in an order which stated that no judge "has requested that a vote be taken thereon." Order (Aug. 6, 1999).

- The Third Circuit, holding that the "necessary proximate-cause connection is missing," unanimously affirmed dismissal of the complaint. Rehearing *en banc* was denied. *Steamfitters* v. *Philip Morris*, 171 F.3d 912, 934 (Stm. Pet. 37a) (3rd Cir. 1999), *r'hg and r'hg en banc denied* (Apr. 29, 1999).

- The Ninth Circuit unanimously held that plaintiff union funds' "RICO and antitrust claims are 'too remote' from defendants' alleged wrongdoing to allow recovery" and affirmed dismissal of the complaint. No petition for rehearing or rehearing *en banc* was filed. *Oregon Laborers* v. *Philip Morris*, 185 F.3d 957, 964 (OL Pet. 9a) (9th Cir. 1999).

Most recently, the Seventh Circuit also unanimously affirmed dismissal of claims by union funds for the recovery of medical expenses and directed dismissal of similar claims by various Blue Cross entities on the grounds, *inter alia*, that "[t]he injury for which the plaintiffs seek compensation is remote indeed." *International Bhd. of Teamsters* v. *Philip Morris, Inc.*, and *Arkansas Blue Cross* v. *Philip Morris, Inc.* (joint opinion) 1999 WL 1034711 at *6 (7th Cir. Nov. 15, 1999).

The lack of a conflict among the Courts of Appeals on the question presented strongly indicates that review should be denied. This conclusion is further confirmed by the fact that, as discussed below, there is no conflict with decisions of this Court (*see* Point II, *infra*), or with decisions of Courts of Appeals in other contexts (*see* Point III.A, *infra*). Furthermore, asserted conflicts with decisions of federal district courts or state trial courts would not warrant the grant of *cer-*

tiorari — even apart from the fact that Petitioners misdepict the weight of the authority and the pertinence of decisions from those courts. *See* Points III.B & III.C, *infra*.*

II. THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND ANY DECISION OF THIS COURT.

There is no conflict between the Courts of Appeals decisions rejecting union fund claims and decisions of this Court. To the contrary: as all four Courts of Appeals have unanimously recognized, dismissal of the funds' claims to recover medical expenses paid to treat fund participants follows inexorably from this Court's precedents barring claims for remote and indirect injuries. As this Court observed in *Holmes* v. *SIPC*, 503 U.S. 258, 266 n.10 (1992), a tortious act will often cause "ripples of harm" extending to various persons. For example, an insurance company may suffer loss when an insured is injured, or an employer may incur costs when an employee is harmed. However, long-standing principles of law bar persons who suffer indirect and derivative injuries by virtue of their contractual or other legal relationships with direct victims of wrongdoing from recovering in their *own right* from the tortfeasor; rather, a plaintiff in the position of the union funds must pursue its recovery through subrogation, standing in the shoes of the directly injured victim.

As this Court set forth in *Holmes*, the rule barring claims for remote and indirect injuries springs from that aspect of the common law doctrine of proximate cause that "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. This "requirement" of direct injury ("one of [the] central elements" of proximate causation) (*id.* at 269) is articulated in no fewer than four decisions by this Court. Thus, in 1877, in *Mobile Life Ins. Co.* v. *Brame*, 95 U.S. 754, this Court barred a life insurer's

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* A chart describing the disposition of union fund and other private payor cases in federal courts is appended to this brief. *See* RA1.

attempt to recover directly against the murderer of its insured, explaining:

> The relation between the insurance company and [the insured] was created by a contract between them, to which [the murderer] was not a party. The injury inflicted by him was upon [the insured], against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. (*Id.* at 758-59.)

This Court added that: "we are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759. Thereafter, in *United States* v. *Standard Oil*, 332 U.S. 301, 311-16 (1947), this Court held that the Government did not have a direct right of action under the common law to recover from a tortfeasor medical expenses incurred by the Government as a result of tortious injury to a soldier. This Court made clear that no such cause of action existed, and declined to create one.

The settled common law bar to recovery for remote injuries has been expressly applied and incorporated by this Court into the antitrust laws, *Associated General Contractors* v. *California State Council*, 459 U.S. 519, 531-33 (1983) ("*AGC*"), and RICO, *Holmes*, 503 U.S. at 268-71. In *AGC*, the Court held that Congress intended common law principles of proximate causation, directness of injury, and certainty of damages to apply to antitrust damages litigation. *See* 459 U.S. at 532-333. This Court in *AGC* illustrated the rule barring remote and indirect claims with an example drawn from the facts of the seminal case of *Anthony* v. *Slaid*, 52 Mass. 290 (Mass. 1846). *See* 459 U.S. at 532 n.25. Anthony, who had contracted to support a town's poor, sued for his increased medical expenditures after defendant's wife assaulted a pauper. The Massachusetts Supreme Judicial Court unanimously denied recovery, concluding that the injury to Anthony —

notwithstanding the intentional nature of the tort — was "too remote and indirect." 52 Mass. at 291.

Thereafter, in 1992, in *Holmes*, this Court held that RICO likewise adopted the common law "demand" for a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The Court held that SIPC — which stood in the shoes of customers of two different broker-dealers — was not entitled to pursue RICO claims against an insider whose stock manipulation had caused the failure of the broker-dealer, which had in turn caused the customers' loss. While the manipulation caused cognizable harm to the *broker-dealer*, this Court held "the link is too remote between the stock manipulation alleged and the *customers*' harm." *Id.* at 271 (emphasis added).

The injury alleged by the Petitioner funds — payment of medical expenses to treat personal injuries suffered by fund participants allegedly injured by smoking (*see* p. 1, *supra*) — falls squarely within a category of injuries which for over 150 years has been held to be remote, indirect and derivative. Under long-settled law, any such claim must be asserted, if at all, by way of subrogation, whereby the third-party payor "steps into the shoes" of the injured individual and is subject to whatever defenses may be asserted against that individual. *See, e.g., Laborers Local*, 191 F.3d at 233 (LL Pet. 4a); *International Bhd. of Teamsters*, 1999 WL 1034711 at *3 (7th Cir. Nov. 15, 1999) ("insurers or other third-party providers of assistance and medical care ... may recover only to the extent their contracts subrogate them to the victim's rights.").

Petitioners claim that their injuries came about through "two separate causal chains." The first "causal chain" supposes that defendants directed their alleged wrongful acts at the *funds* themselves, thus supposedly preventing the funds from taking steps to reduce their medical costs by, for example, discouraging smoking by their members. The second "causal chain" supposes that defendants "withheld accurate information and safer cigarettes *from smokers*," thus resulting

in increased costs to the funds from their participants' smoking-related illnesses. Stm. Pet. 9 (emphasis added); *see also Oregon Laborers*, 185 F.3d at 962 (OL Pet. 4a); *Laborers Local*, 191 F.3d at 239 (LL Pet. 16a).

Nevertheless, under each of these theories, the injury to the funds only occurred because fund participants smoked, became ill, and incurred medical costs which the funds paid pursuant to their plan contracts. Thus, as the Second, Third and Ninth Circuit decisions at bar have all recognized, on *each* of the funds' "causal chains," injury to the funds is an indirect and remote consequence of fund participants' personal injuries. *See Laborers Local*, 191 F.3d at 239 (LL Pet. 16a) (funds' "damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products"); *Steamfitters*, 171 F.3d at 927 (Stm. Pet. 24a) (injury to funds came about through injury to smokers); *Oregon Laborers*, 185 F.3d at 963 (OL Pet. 8a) ("all of plaintiffs' claims rely on alleged injury to smokers"). In concluding that the funds' alleged injury was too remote and indirect as a matter of law, the Second, Third and Ninth Circuit decisions at bar — far from "creat[ing] a new requirement for 'direct' injury," as Petitioners argue (LL Pet. 4; Stm. Pet. 4; OL Pet. 4) — properly applied *AGC*, *Holmes* and this Court's other precedents to the particular factual framework in these cases.*

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* Petitioners argue to this Court (as they did to all the Courts of Appeals) that their first theory — which they label the "one-link causal chain" — does not suffer from any problem of remoteness because, under this theory, the funds "were *directly* lied to, defrauded, and deprived of the benefits of new and safer tobacco products. The effect of defendants' misconduct on [Petitioners] was not mediated through any effect on a third party." LL Pet. 19; Stm. Pet. 19; OL. Pet. 18. But Petitioners are simply wrong, for the proximate cause/indirectness analysis looks at the relation between the *injury* alleged and defendants' misconduct. *See, e.g., Holmes*, 503 U.S. at 268 ("demand for some direct relation between the *injury asserted* and the injurious conduct alleged") (emphasis added); *AGC*, 459 U.S. at 535 (court must evaluate "the relationship between" "the plaintiff's *harm*" and "alleged wrongdoing") (emphasis added). As noted in the text, the Courts of Appeals are in agreement that the funds'

Indeed, the injury alleged by Petitioners is *even more* remote and indirect than the injuries held *not* actionable in *AGC* and *Holmes*. In those cases, plaintiffs' injuries were impermissibly remote and indirect, but plaintiffs at least were deemed to be asserting an injury *separate* from that of the directly injured party. Not so here. Here, the funds' injuries all derive from the fact that the funds were called upon to pay the medical expenses *of* their directly injured participants. As the Second Circuit recognized in *Laborers Local*, the funds' injury, *however characterized*, is "entirely derivative of the harm suffered by plan participants as a result of using tobacco products." *Laborers Local*, 191 F.3d at 239 (LL Pet. 16a).

Petitioners argue that the Second, Third and Ninth Circuits erroneously applied the requirement of direct injury in a "formalistic" way and downplayed a multi-factor remoteness analysis, which, Petitioners assert, must be applied anew on an *ad hoc* basis in each case. LL Pet. 14-23; Stm. Pet. 13-24; OL Pet. 12-21. But, to the contrary: all three Courts of Appeals explicitly analyzed and assessed the *AGC/Holmes* "factors" in light of the funds' allegations, and concluded that these factors *supported* dismissal. *See Laborers Local*, 191 F.3d at 239-41 (LL. Pet. 17a-20a); *Oregon Laborers*, 185 F.3d at 963-66 (OL Pet. 8a-14a); *Steamfitters*, 171 F.3d at 923-34 (Stm. Pet. 16a-37a). Given that all three Courts of Appeals *did* analyze these policy considerations in concluding that dismissal was required, these cases simply do not provide an opportunity to address the question whether such analysis was in fact required. Thus:

- All three Courts of Appeals stressed the difficulty inherent in "ascertain[ing] the amount of [the funds'] damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269. *See Laborers Local*, 191 F.3d at 239-40 (LL Pet. 17a-18a) ("incredibly speculative . . . virtually impossible

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alleged *injury* is derivative of smokers' personal injuries on *both* of the funds' causal theories.

. . . to prove with any certainty"; requires "sheerest sort of speculation"); *Steamfitters*, 171 F.3d at 930, 933 (Stm. Pet. 29a, 35a) ("highly speculative and complex"; "tortured path . . . to the Funds' increased expenditures"; "this causation chain is much too speculative and attenuated"); *Oregon Laborers*, 185 F.3d at 965 (OL Pet. 13a) (speculativeness of claims "weigh[s] heavily, if not dispositively, in favor of barring plaintiffs' actions").

- The concern that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries" (*Holmes*, 503 U.S. at 269) likewise supports dismissal here, as all three Courts of Appeals recognized. *See Laborers Local*, 191 F.3d at 240-41 (LL Pet. 18a-19a); *Steamfitters*, 171 F.3d at 933 (Stm. Pet. 35a-36a); *Oregon Laborers*, 185 F.3d at 965-66 (OL Pet. 14a).

- The Second and Ninth Circuits correctly recognized that lawsuits by smokers (or by the funds in subrogation of individual smokers) were available to remedy losses arising from any personal injuries inflicted on smokers, thus satisfying "the general interest in deterring injurious conduct" (*Holmes*, 503 U.S. at 269):

  > "The Funds may still bring a subrogation action to recover the medical costs paid out for the individual smokers, and the smokers themselves have sufficient independent incentive to pursue their own causes of action for such additional types of injuries as pain and suffering. Although these will not be RICO claims, they will remedy the harm done by defendants' alleged misconduct." *Laborers Local*, 191 F.3d at 241 (LL. Pet. 20a).

> "The existence of the smokers, who are more direct victims of the alleged wrongful conduct and who can be counted on to vindicate the injury caused by defendants' alleged wrongful conduct, weighs heavily in favor of barring plaintiffs' actions." *Oregon Laborers*, 185 F.3d at 964 (OL Pet. 10a-11a).*

Petitioners also argue that the Courts of Appeals erred by failing to recognize that "[t]he purpose of these factors is to

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* Petitioners claim that review by this Court is required because of supposed "conflicts" in the *AGC/Holmes* policy factor analysis that each Court of Appeals concluded required dismissal of Petitioners' claims. *See* LL Pet. 11; OL Pet. 9-10. But, as the text accompanying this footnote shows, any differences between the Courts' analyses are greatly outweighed by the agreements and, in any event, the ultimate result in each case was the same. Any such differences in analysis as may exist fall far short of "conflicts" requiring this Court's review.

In addition, it is respectfully submitted that *AGC* and *Holmes* do not require that the "factors" discussed therein — which *Holmes* described as "*reasons*" for the "directness of relationship" "*requirement*" (503 U.S. at 269 (emphasis added)) — be applied anew in every case, even in categories of cases in which the principles of proximate causation are long-settled, as they are here. *See* pp. 4-6, *supra*. Although, as this Court observed in *AGC*, 459 U.S. at 536, and in *Holmes*, 503 U.S. at 272, n.20, a black-letter rule cannot be announced that would dictate the result of "*every* case," that does *not* mean that *no* black-letter rule can ever be articulated that would require dismissal in *any* case. For example, it is uniformly settled that a corporate shareholder may not bring a "direct" claim to recover for diminution to the value of his shares occasioned by injury to the corporation. Thus, there is no need in each attempted "direct" suit by a shareholder to engage in a case-by-case analysis of the policy factors; rather, it is well-settled that the shareholder's only recourse lies in bringing a derivative suit on behalf of the corporation. Nor should there be any need to engage in an *ad hoc* review of the policy factors here where another well-settled rule likewise applies to require dismissal, to wit, "plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the damage." *Laborers Local*, 191 F.3d at 237 (LL Pet. 12a). However, as noted in the text, given that here all three Courts of Appeals *did* in fact analyze the policy "factors" in concluding that dismissal was required, it makes no difference here whether such an analysis was in fact "required."

identify which of several possible plaintiffs will be given standing to sue for a RICO [or antitrust] violation." LL Pet. 14; Stm. Pet. 13; OL Pet. 13. In other words, Petitioners argue that *some* plaintiff must always be given standing to bring a federal treble damages suit under RICO or the antitrust laws for every injury, *no matter how remote, indirect, and derivative that injury is*. But Petitioners' "best plaintiff" theory is unfounded, and was unanimously (and properly) rejected. *AGC* specifically observed that "there is a point beyond which [a] wrongdoer *should not be held liable*" for the "ripples of harm" flowing from a violation of the antitrust laws, and explicitly rejected any contention that there must always be a plaintiff with standing to bring a federal statutory treble damages suit for every injury: "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." 459 U.S. at 534 (emphasis added). To like effect, *Holmes* explains that the doctrine of proximate cause is a "judicial tool[ ] used to *limit* a person's responsibility for the consequences of that person's own acts." 503 U.S. at 268 (emphasis added). Moreover, as noted above, individual smokers can bring suit to remedy any personal injuries suffered (and the funds, standing in the shoes of their participants, may pursue subrogation claims to recover medical expenses paid to treat particular individual smokers) — albeit (as all parties agree) such claims would not be federal RICO or antitrust claims because such personal injury claims would not satisfy the injury to "business or property" requirement for suit under those statutes.*

Indeed, Petitioners' "best plaintiff" theory turns Congressional intent on its head. The inability of those directly injured (*i.e.*, individual smokers) to sue under RICO or the

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* *See, e.g.*, Stm. Pet. 2, 20 ("Smokers cannot bring RICO and antitrust claims because they ... cannot satisfy the 'business or property' requirement"); LL Pet. 3 (funds are "*only plaintiffs ... legally able to assert these RICO claims*") (emphasis in original), 19-20; OL Pet. 3, 18.

antitrust laws for their medical expenses because personal injuries are not injuries to "business or property" is hardly a point *in favor* of allowing *the funds* to sue under these federal statutes for those same injuries. This would flout Congress' policy determination *not* to permit recovery of personal injury damages, including medical expenses, in RICO or antitrust treble damage actions — no matter by whom asserted. *See Laborers Local*, 191 F.3d at 241 (LL Pet. 20a) ("the lack of a RICO damages remedy for even direct personal injuries ... actually weighs heavily *against* RICO standing for parties (such as the Funds) alleging harms that are purely contingent on personal injuries suffered by others") (emphasis added); *Oregon Laborers*, 185 F.3d at 964 (OL Pet. 9a-11a).

Petitioners' argument that there is a conflict between the three Courts of Appeals decisions from which they seek *certiorari* and certain other decisions of this Court (LL Pet. 4, 16-17; Stm. Pet. 4, 15-16; OL Pet. 4, 14-15) is also manifestly without merit. None of the cases Petitioners cite held that a plaintiff can sue under RICO or the antitrust laws for injuries arising as a consequence of prior injuries to another (to say nothing of indirect injuries resulting from treating or compensating the first-injured person for his injury). Thus:

- In *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), the plaintiff was *directly* injured as a participant (buyer) in the market for psychotherapy services. *See AGC*, 459 U.S. at 540 n.44; *see also Steamfitters*, 171 F.3d at 926; *Oregon Laborers*, 185 F.3d at 967.

- In *NOW* v. *Scheidler*, 510 U.S. 249 (1994), the only issue on which *certiorari* was granted was whether an economic motive was required for a RICO claim (*id.* at 252), and the only standing issue addressed by this Court was the "threshold" issue whether plaintiffs had *jurisdictional* or *Article III* standing – which requires only injury-in-fact and not the proximate cause requirement of "direct injury" that bars plaintiffs' claims here (*id.* at 255-56).

- *Allied Tube* v. *Indian Head*, 486 U.S. 492 (1988) (which limited *certiorari* to an issue of Noerr-Pennington immunity, *id.* at 499 n. 3), and *American Soc'y Mech. Eng'rs* v. *Hydrolevel*, 456 U.S. 556 (1982), concern injuries to competitors caused by influencing standard-setting bodies to promulgate certain standards and issue interpretations of such standards; in neither case did the Court address any issue of direct injury/proximate cause.

- *Illinois Brick* v. *Illinois*, 431 U.S. 720 (1977), simply recognizes a narrow exception to the separate "direct purchaser rule" of the antitrust laws for cost-plus contracts.

- *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), which upheld a presumption of reliance on public misrepresentations in Rule 10b-5 actions, did not concern RICO *or* the antitrust laws *or* the issue of proximate causation.

- Although this Court in *Sedima* v. *Imrex*, 473 U.S. 479, 497 (1985), noted generally that "RICO is to be read broadly," the case did *not* involve any issue of standing to pursue RICO claims for remote and indirect injuries. And *thereafter* in *Holmes*, this Court squarely held that Congress intended to require direct injury in RICO actions. 503 U.S. at 265-68. As this Court stated, "[a]llowing suits by those injured only indirectly" would actually " '*undermine*[ ] the effectiveness of treble-damage suits.' " *Holmes*, 503 U.S. at 274 (emphasis added), *quoting AGC*, 459 U.S. at 545.*

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* The funds, quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947, argue that RICO "shall be liberally construed to effectuate its remedial purposes." LL Pet. 12; Stm. Pet. 11; OL Pet. 10. But this does *not* mean that there is standing under RICO to assert claims for remote and indirect injuries, as the Court made clear in *Holmes* in rejecting the identical argument that § 904(a) required a finding that SIPC had standing. *See* 503 U.S. at 274.

For all these reasons, the decisions of the Courts of Appeals faithfully apply settled principles set forth in this Court's cases. Review therefore should be denied.

Finally, Petitioners' assertion that *Beck* v. *Prupis*, No. 98-1480, *cert. granted*, 119 S.Ct. 2046 (1999), *argued* Nov. 3, 1999, raises a "related" question concerning "the proper interpretation of the [*Holmes*] proximate cause factors" (OL Pet. 2; LL Pet. 2) is without merit. The issue in *Beck*, as stated by the Eleventh Circuit, was whether "a plaintiff bringing a civil RICO conspiracy claim [must] prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering.' " 162 F.3d 1090, 1093 (11th Cir. 1998). This was also the "Question Presented" in Petitioner Beck's brief to this Court. *See* 1999 WL 543861 at *i. This is a different issue from that presented by Petitioners here.

III. PETITIONERS' OTHER CLAIMS OF CONFLICT ARE WITHOUT MERIT.

A. There is no conflict with the other Courts of Appeals decisions in other contexts that Petitioners rely upon.

As noted, there is unanimous agreement between the Courts of Appeals to have addressed Petitioners' claims and no conflict with decisions of this Court. The Courts of Appeals decisions in other contexts relied on by Petitioners (*see* LL Pet. 17-19; Stm. Pet. 16-19; OL Pet. 15-18) do not remotely create a conflict, much less a conflict warranting review by this Court:

- *Blue Cross* v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), involving an antitrust claim by a Blue Cross payor who was overcharged by a seller of medical services (the clinic), is "inapposite," as the Seventh Circuit itself made plain in its recent decision in *Inter-*

national Bhd. of Teamsters v. *Philip Morris*. *See* 1999 WL 1034711 at *7 (7th Cir. Nov. 15, 1999).*

- *Steele* v. *Hospital Corp.*, 36 F.3d 69, 71 (9th Cir. 1994), held that patients could *not* sue under RICO based on overcharges to their insurance company because the patients had suffered no financial loss. The *Oregon Laborers* funds argued to the Ninth Circuit that *Steele* supported their position (*see* Plaintiffs-Appellants' Mar. 1, 1999 Br. at 27), but the Ninth Circuit obviously did not agree. But, even assuming *arguendo* that an overcharged insurance company would have had a RICO claim against an overcharging seller of medical services (which was *not* at issue in *Steele*), that scenario is not germane here (for the same reason that *Marshfield* is "inapposite"). In any event, even if (contrary to fact) one hypothesized conflicts *within* the Ninth Circuit, such conflicts would not warrant grant of *certiorari*. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).
- *Mid Atlantic Telecom* v. *Long Distance Servs.*, 18 F.3d 260 (4th Cir. 1994), which involved a RICO claim alleging that a competitor's fraudulently low rates forced plaintiff to lower its own rates and caused loss of customers, is likewise irrelevant. The Fourth Circuit observed that "Mid Atlantic's injuries, as alleged, *are not derivative of any losses suffered by its former cus-*

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* Petitioners argue that the decisions of the four Courts of Appeals rejecting cl[illegible]ns by payors of the medical expenses of others to treat injuries inflicted upon such others by a tortfeasor mean that "fraudulent overbilling or anticompetitive price-fixing by a cancer medicine supplier would not be actionable by the payor." LL Pet. 13; Stm. Pet. 12-13; OL Pet. 12. But Petitioners are wrong and their hypothetical is not to the point: in the hypothetical (as in *Marshfield*) there may be a direct injury resulting from the wrongful acts of the medical supplier; however, the hypothesized suit is not against a tortfeasor alleged to have caused the injury to the patient requiring that he be treated by the "cancer medicine."

tomers. Rather, it claims *distinct and independent injuries*." *Id.* at 264 (emphasis added).

- Finally, Petitioners' footnote citations (LL Pet. 18 n.5; Stm. Pet. 17 n.7; OL Pet. 16 n.4) include: Third Circuit cases which *Steamfitters* explicitly ruled were not on point (*see* 171 F.3d at 923, 931-32 (Stm. Pet. 15a-16a, 30a-32a)); Second Circuit cases which *Laborers Local* addressed and explicitly concluded were examples of *direct* injury (*see* 191 F.3d at 237-39 (LL Pet. 13a-15a)); and a Seventh Circuit case (*In re EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991) which that Court pointed out in *International Bhd. of Teamsters* is "inapposite" (1999 WL 1034711 at *7). The other cases in Petitioners' footnote are not on point and, in any event, are all from Circuits in which appeals of dismissals of substantially identical union fund cases are now pending (*i.e.*, in the Fifth, Eighth, Ninth, Tenth and Eleventh Circuits).

B. Conflicts among the district courts would not warrant the grant of *certiorari* and, in any event, the district courts have overwhelmingly rejected medical expense recovery suits by union funds and other private payors.

Even if one hypothesized a split among the federal *district* courts in these cases, such a split would not warrant exercise of this Court's *certiorari* jurisdiction. But, in any event, Petitioners misrepresent the weight of the authority in union fund and other private payor cases in federal district courts. *See* LL Pet. 25-27; Stm. Pet. 26-29; OL Pet. 22-25. The federal district courts have overwhelmingly rejected these suits. To date, 16 federal district courts have dismissed the RICO and federal antitrust claims in such suits as a matter of law. *See* RA2-4, *infra*. In addition, in other federal district courts RICO and federal antitrust claims have been voluntarily dismissed by plaintiffs. *See* RA4-5, *infra*. By contrast, of those federal district courts that thus far have decided motions to dismiss,

RICO and federal antitrust claims survive today in only two. *See* RA5-6, *infra*.*

C. Conflicts with district court or state trial court decisions in cases brought by states or state attorneys general would not warrant the grant of *certiorari* and, in any event, there is no conflict.

Petitioners' repeated reliance on cases brought by states or state attorneys general is misplaced. Only *two* of the decided cases brought by states or state attorneys general against the tobacco companies — the Texas and Puerto Rico suits (*Texas* v. *American Tobacco Co.*, 14 F.Supp.2d 956 (E.D. Tex. 1997); *Rosello* v. *Brown & Williamson*, No. 97-1910 (JAF), slip op. (D.P.R. Aug. 10, 1998)) — asserted federal RICO or antitrust claims. Both courts relied on the state's invocation of so-called "quasi-sovereign" or *parens patriae* authority in allowing these cases to continue, decisions with which Respondents disagree but concepts which obviously are not applicable in suits by union funds. *See Laborers Local*, 191 F.3d at 244 (LL Pet. 25a); *Steamfitters*, 171 F.3d at 934 n.18 (Stm. Pet. 37a). In addition, the court in the Texas suit dismissed the state's federal antitrust claims and essentially deferred ruling upon the sufficiency of the federal RICO claim. *Texas*, 14 F. Supp.2d

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* Of these two district courts, one (in Utah) certified its order for appeal under § 1292(b); on November 22, 1999, the Tenth Circuit granted leave to appeal. Only one federal judge, Judge Weinstein in the Eastern District of New York, has both refused to dismiss the cases before him (*National Asbestos* and *New Jersey Blue Cross*) and refused to certify. *See* RA6, *infra*. As the Seventh Circuit observed in *International Bhd of Teamsters*, Judge Weinstein's denial of defendants' motions to dismiss "is a thinly disguised refusal to accept and follow the second circuit's holding [in *Laborers Local*]." 1999 WL 1034711 at *8. As to two other cases Petitioners rely upon, in *Arkansas Blue Cross* the Seventh Circuit has now reversed and instructed the district court to dismiss the case (*id.* at *9), and although the court in *Iron Workers* denied 12(b)(6) dismissal of federal RICO and antitrust claims, it subsequently dismissed the antitrust claim on summary judgment and granted a directed verdict on the RICO claim. *See* RA1, 3, *infra*.

at 969-70. The other decisions in state cases cited by Petitioners — all of which were brought in the plaintiff states' own courts — alleged *only* state law claims and are almost entirely decisions of state *trial* courts.* Thus the cases brought by the states cannot support the grant of *certiorari* to review the dismissal by the Courts of Appeals of the union funds' RICO and federal antitrust claims.

Nor is the settlement of the state cases relevant. As the Second Circuit observed (describing decisions of other courts in cases brought by states and state attorneys general): "in general, state cases are often distinguishable on the issue of proximate causation given the state's unique role relative to protection of its citizens, statutes governing Medicaid recoupment, and certain state statutes that permit states to maintain actions on behalf of their citizenry." *Laborers Local*, 191 F.3d at 244 (LL Pet. 25a). *See also Steamfitters*, 171 F.3d at 934 n.18 (Stm. Pet. 37a).

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* The first state action filed in state court was brought in 1994 by the Mississippi Attorney General in a chancery court in Pascagoula, Mississippi. Texas filed its suit in the Texarkana Division of the Eastern District of Texas federal court, where only one judge sat.

Although Petitioners fail to mention it, in all three cases in which the issue reached a state's *highest* court, each state Supreme Court ruled that medical expense payors do *not* have an independent direct cause of action at common law, but can only proceed (if at all) through subrogation. *See Iowa* v. *Philip Morris, Inc.*, 577 N.W.2d 401, 407 (Iowa 1998); *Agency for Health Care* v. *Associated Indus.*, 678 So.2d 1239, 1248 (Fla. 1996) (holding that state did not possess independent cause of action prior to 1994 anti-tobacco statute), *cert. denied*, 520 U.S. 1115 (1997); *Minnesota* v. *Philip Morris*, 551 N.W.2d 490, 495 (Minn. 1996) (dismissing Blue Cross' special duty claim as "simply too remote"; allowing certain state statutory claims to survive because specific state statutes involved assertedly overcame remoteness bar). Thus, the three highest state courts to reach these issues — like the four federal Courts of Appeals — recognized that "direct" claims by medical expense payors are barred under traditional common law principles (which, as noted, this Court has applied to private actions under the federal antitrust laws and RICO, *see* pp.5-6, *supra*).

Similarly, the mere *filing* of suit by the United States against the tobacco companies (*see* LL Pet. 4-5; Stm. Pet. 4; OL Pet. 4) cannot possibly justify *certiorari*. That lawsuit has not yet produced a district court decision evaluating its legal merit, much less appellate review of such a decision. Moreover, two of the three claims asserted (under the Medical Care Recovery Act and the Medicare Secondary Payer statute) were not asserted in these union fund cases, and the RICO claim is brought pursuant to 18 U.S.C. § 1964(a) and (b) and seeks only equitable relief whereas the focal point of Petitioners' suits was treble damages pursuant to § 1964(c). *See* p. 20, *infra*.*

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* Review of the Courts of Appeals decisions at bar is also unwarranted because there are *multiple* grounds for affirming the decisions, and review would not lead to reversal. *First*, Petitioners' RICO and antitrust claims are also barred because medical expenses occasioned by personal injuries are not injury to "business or property." 15 U.S.C. § 15; 18 U.S.C. §1964(c); *see also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The medical expenses the funds seek here are an integral component of their participants' personal injury claims (*see, e.g., Metro-North* v. *Buckley*, 521 U.S. 424, 438-39 (1997); 2 Dobbs, *Law of Remedies* §§ 8.1(1), (3) (2d ed. 1999)), and accordingly are not "business or property" injury. *See Laborers Local*, 191 F.3d at 241 (LL Pet. 19a-20a); *Oregon Laborers*, 185 F.3d at 964 and 968 (OL Pet. 9a-10a, 19a). To permit the funds to characterize medical expenses for personal injuries allegedly inflicted upon others as "business or property" injury to themselves would sanction a form of legal alchemy which would permit the existence of insurance to transform state-law claims for personal injuries into federal antitrust and RICO treble damages claims. There is no basis for such a result.

Second, Petitioners were not participants in a market that defendants are alleged to have restrained and thus did not suffer antitrust injury. *See Oregon Laborers*, 185 F.3d at 966-67 (OL Pet. 16a-18a). *Third*, there are procedural deficiencies in the record below that make these cases unattractive vehicles for the presentation of plaintiffs' position. Specifically, the funds' conclusory allegations of reliance lack the required particularity. In addition, as a matter of law, the funds *cannot* plead *justifiable* reliance because a plaintiff who is on *notice* of facts that should arouse suspicion must make a reasonable investigation to ascertain the truth. Court after court has recognized that the health risks asso-

IV. THE FUNDS' CLAIMS FOR INJUNCTIVE RELIEF UNDER RICO DO NOT WARRANT THE GRANT OF *CERTIORARI*.

The *Oregon Laborers* Petitioners state that *certiorari* is needed to decide whether injunctive relief is available to a private RICO plaintiff (OL Pet. 25), and the *Laborers Local* Petitioners ask the Court to decide whether the *Holmes* "factors" apply to their RICO claim for injunctive relief (LL Pet. 27; *see also* Stm. Pet. 24 n.10 (referencing same issue)). But Petitioners' suggestions that these cases present issues concerning injunctive relief under RICO are misleading, and review by this Court of any such issue is plainly unwarranted here.

First, the procedural history of these cases makes them poor vehicles for addressing questions of injunctive relief under RICO. Thus, the issue of injunctive relief in these cases is a clear afterthought to Petitioners' claims for RICO treble damages. The funds' Courts of Appeals briefs barely mentioned RICO injunctive relief: the *Oregon Laborers* Petitioners' Ninth Circuit briefs devoted barely one page (out of 90) to the issue, and the *Laborers Local* Petitioners' Second Circuit brief did not address it at all (their Petition for Rehearing devoted only a half page to the issue). Moreover, the *Oregon Laborers* Petitioners appear to argue (at least in part) that injunctive relief under § 1964(a) is available to those private litigants who have standing to sue for damages under § 1964(c). *See* OL Pet. 27. But § 1964(c) requires a plaintiff to show injury to its "business or property" — which Petitioners cannot do. *See* p. 19n.*, *supra*. Thus, here the issue of whether a private plaintiff may sue for injunctive relief under RICO is complicated by the threshold issue of Petitioners' lack of "business or property" injury. In short,

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ciated with smoking are a matter of longstanding common knowledge. *See, e.g., Roysdon* v. *R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988); *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996).

even were there a fully developed circuit split concerning the availability of RICO injunctive relief in a suit by a private plaintiff — and there is not (see below) — these cases are not appropriate vehicles by means of which to address the issue.

Second, there is no circuit split warranting review. The Ninth Circuit rejected the funds' claim for RICO injunctive relief on the basis of its decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). *See Oregon Laborers*, 185 F.3d at 967-68 (OL Pet. 19a). *Wollersheim* extensively reviewed the legislative history of 18 U.S.C. §1964 and concluded that injunctive relief under RICO is not available to private litigants. 796 F.2d at 1084-87. A number of Courts of Appeals are in agreement with the Ninth Circuit's conclusion. *See, e.g., In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Dan River, Inc.* v. *Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Trane Co.* v. *O'Connor Securities*, 718 F.2d 26, 28-9 (2d Cir. 1983); *see also Kaushal* v. *State Bank of India*, 556 F.Supp. 576, 581-85 (N.D.Ill. 1983). Certain Courts of Appeals have not expressed a view on the issue. The *only* example Petitioners can offer of a Court of Appeals indicating that injunctive relief *is* available to a private RICO plaintiff is a one sentence footnote in *Faircloth* v. *Finesod*, 938 F.2d 513, 518 n.11 (4th Cir. 1991) (OL Pet. 26 n.10). In that footnote, a panel of the Fourth Circuit — without discussion and citing no authority (in particular, not citing *Dan River* (*op. cit.*), an earlier Fourth Circuit case expressing "substantial doubt" that such relief was available) — affirmed a permanent injunction issued incident to an award of treble damages to prevent defendant from collecting on a note wrongly obtained from plaintiff. *See* OL Pet. 26 n.10. This solitary footnote does not establish a circuit split warranting *certiorari*.*

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* The Third Circuit in *Steamfitters* states that "circuits are split" on the issue of injunctive relief for private RICO plaintiffs, and cites *Conkling* v. *Turner*, 18 F.3d 1285, 1296 n.8 (5th Cir. 1994), for that statement. 171 F.3d at 935 n.20 (Stm. Pet. 39a). But the only Court of Appeals case *Conkling* cites as favoring the availability of such relief is *Bennett*

Third, unless the Court first overrules *Wollersheim* and other Courts of Appeals and holds that RICO injunctive relief *is* available to a private plaintiff, it would obviously be futile for the Court to address the issue raised by the *Laborers Local* Petitioners of whether the *Holmes* policy considerations apply in such a suit for injunctive relief. In addition, Petitioners are asking this Court to decide the applicability of the *Holmes* considerations in a private RICO injunction suit on an entirely clean slate: Petitioners do not identify any court in the country that has addressed this issue (*all* the cases Petitioners cite on this point concern injunctive relief under the antitrust laws, *see* LL Pet. 27-30).

CONCLUSION

For the foregoing reasons, the petitions for writs of *certiorari* in *Laborers Local*, *Steamfitters* and *Oregon Laborers* should be denied.

Dated: November 23, 1999

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v. *Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982); however, *Bennett* merely cites to a law review article "without at this time endorsing or rejecting the opinions there expressed." Moreover, the argument of the article cited by the Eighth Circuit in *Bennett* — an argument relied on by the *Oregon Laborers* Petitioners (*see* OL Pet. 27) — has been criticized by a number of courts. *See, e.g., Sedima* v. *Imrex Co.*, 741 F.2d 482, 490 n.20 (2d Cir. 1984) ("a rather remarkable argument"), *rev'd on other grounds*, 473 U.S. 479 (1985); *Kaushal*, 556 F.Supp. at 582 & n.17 ("bizarre and wholly unconvincing" argument).

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Appendix

FEDERAL COURT OPINIONS IN SUITS BROUGHT BY UNION FUNDS AND OTHER PRIVATE PAYORS ASSERTING RICO AND/OR FEDERAL ANTITRUST CLAIMS

A. FEDERAL COURTS DISMISSING RICO AND/OR FEDERAL ANTITRUST CLAIMS

1. Courts of Appeals

Second Circuit:

Laborers Local 17 Health & Benefit Fund v. *Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) (on § 1292(b) appeal by defendants, reversed denial of 12(b)(6) motion and directed dismissal of RICO claims; federal antitrust claims previously dismissed by district court, 7 F.Supp.2d 277 (S.D.N.Y. 1998)), *r'hg and r'hg en banc denied* (2d Cir. Aug. 6, 1999).

Third Circuit:

Steamfitters Local Union No. 420 Welfare Fund v. *Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999) (affirmed dismissal of RICO and federal antitrust claims), *r'hg and r'hg en banc denied* (Apr. 29, 1999).

Seventh Circuit:

International Brotherhood of Teamsters, Local 734 Health & Welfare Trust Fund and Central States Joint Board Health & Welfare Trust Fund v. *Philip Morris, Inc.*, and *Arkansas Blue Cross & Blue Shield* v. *Philip Morris Inc.*, 1999 WL 1034711 (7th Cir. Nov. 15, 1999) (suits by union funds and Blue Cross/Blue Shield enti-

ties;* affirmed or directed dismissal of all claims, including RICO and federal antitrust claims).

Ninth Circuit:

Oregon Laborers–Employers Health & Welfare Trust Fund v. *Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999) (affirmed dismissal of RICO and federal antitrust claims).

2. District Courts

Allegheny General Hosp. v. *Philip Morris, Inc.*, No. 99-9, slip op. (W.D. Pa. Nov. 4, 1999) (Judge Ambrose) (RICO and federal antitrust claims by hospital owners and operators dismissed).

Arkansas Carpenters' Health & Welfare Fund v. *Philip Morris, Inc.*, No. LR-C-97-754, slip op. (E.D. Ark. Sept. 28, 1999) (Judge Moody) (RICO and federal antitrust claims dismissed); notice of appeal filed; appeal voluntarily dismissed (8th Cir. Nov. 22, 1999).

Rhode Island Laborers' Health & Welfare Fund v. *Philip Morris, Inc.*, 1999 WL 619064 (D.R.I. Aug. 11, 1999) (Magistrate Judge Lovegreen) (recommending dismissal of RICO and federal antitrust claims; recommendation pending with district court).

Massachusetts Laborers' Health & Welfare Fund v. *Philip Morris, Inc.*, 62 F.Supp.2d 236 (D. Mass. 1999) (Judge O'Toole) (RICO and federal antitrust claims dismissed).

Lyons v. *Philip Morris, Inc.*, No. 98-515, slip op. (D. Minn. Apr. 29, 1999) (Judge Magnuson) (RICO and federal antitrust claims dismissed); appeal pending.

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* Except where specifically indicated, plaintiffs in the cases listed herein were union funds.

Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. *Philip Morris, Inc.*, No. 8:98CV364, slip op. (D. Neb. Feb. 18, 1999) (Judge Shanahan) (RICO and federal antitrust claims dismissed).

Laborers' & Operating Engineers' Utility Agreement Health & Welfare Trust Fund for Arizona v. *Philip Morris, Inc.*, No. CIV 97-1406 PHX SMM (D. Ariz. Feb. 10, 1999) (Judge Sedwick) (RICO and federal antitrust claims dismissed); appeal pending.

Hawaii Health & Welfare Trust Fund for Operating Engineers v. *Philip Morris, Inc.*, 52 F.Supp.2d 1196 (D. Haw. 1999) (Judge King) (RICO and federal antitrust claims dismissed); appeal pending.

Regence Blueshield v. *Philip Morris, Inc.*, 40 F.Supp.2d 1179 (W.D. Wash. 1999) (Judge Rothstein) (RICO and federal antitrust claims brought by various Blue Cross/Blue Shield entities dismissed); appeal pending.

Oregon Laborers-Employers Health & Welfare Trust Fund v. *Philip Morris, Inc.*, 17 F.Supp.2d 1170 (D.Or. 1998), *aff'd*, 185 F.3d 957 (9th Cir. 1999) (*see* RA2, *supra*).

Williams & Drake Co. v. *American Tobacco Co.*, No. 98-553, slip op. (W.D. Pa. Dec. 21, 1998) (Judge Ambrose) (RICO and federal antitrust claims brought by self-insured employer dismissed).

Texas Carpenters Health Benefit Fund v. *Philip Morris, Inc.*, 21 F.Supp.2d 664 (E.D. Tex. 1998) (Judge Heartfield) (RICO and federal antitrust claims dismissed); appeal pending.

Iron Workers Local Union No. 17 Insurance Fund v. *Philip Morris, Inc.*, 23 F.Supp.2d 771 (N.D. Ohio 1998) (Judge Gwin) (denying defendants' motion to dismiss); 29 F.Supp.2d 801 (1998) (summary judgment granted dismissing federal antitrust claims); bench order (Mar. 5,

1999) (directed verdict dismissing RICO claims); jury verdict for defendants (Mar. 22, 1999), finding no fraud.

Seafarers Welfare Plan v. *Philip Morris, Inc.*, 27 F.Supp.2d 623 (D. Md. 1998) (Judge Garbis) (RICO and federal antitrust claims dismissed); notice of appeal filed; appeal voluntarily dismissed (4th Cir. Sept. 14, 1998).

New Jersey Carpenters Health Fund v. *Philip Morris, Inc.*, 17 F.Supp.2d 324 (D.N.J. 1998) (Judge Barry) (federal antitrust claims dismissed); slip op. (May 11, 1999) (dismissing RICO claims).

Stationary Engineers Local 39 Health & Welfare Trust Fund v. *Philip Morris, Inc.*, 1998 WL 476265 (N.D. Cal. Apr. 30, 1998) (Judge Jensen) (RICO and federal antitrust claims dismissed); appeal pending.

Steamfitters Local Union No. 420 Welfare Fund v. *Philip Morris, Inc.*, 1998 WL 212846 (E.D. Pa. Apr. 22, 1998), *aff'd*, 171 F.3d 912 (3d Cir. 1999) (*see* RA1, *supra*).

Southeast Florida Laborers District Health & Welfare Trust Fund v. *Philip Morris, Inc.*, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998) (Judge Ryskamp) (RICO and federal antitrust claims dismissed); notice of appeal filed; appeal voluntarily dismissed (11th Cir. Oct. 20, 1998).

B. VOLUNTARY DISMISSALS OF RICO AND FEDERAL ANTITRUST CLAIMS BY PLAINTIFFS

Northwest Laborers-Employers Health & Security Trust Fund v. *Philip Morris, Inc.*, No. C97-849WD, slip op. (W.D. Wash. Dec. 23, 1998) (Judge Dwyer) (denying motion to dismiss); RICO and federal antitrust claims voluntarily dismissed (May 25, 1999); 58 F.Supp.2d 1211 (1999) (granting summary judgment dismissing remaining claims); appeal pending.

West Virginia Laborers' Pension Trust Fund v. *Philip Morris, Inc.*, 1998 WL 964983 (S.D. W. Va. 1998) (Judge Haden) (denying motion to dismiss); RICO and federal antitrust claims voluntarily dismissed (June 28, 1999).

Kentucky Laborers District Council Health & Welfare Trust Fund v. *Hill & Knowlton, Inc.*, 24 F.Supp.2d 755 (W.D. Ky. 1998) (Judge Heyburn) (denying motion to dismiss some RICO claims, but dismissing other RICO claims and federal antitrust claims); remaining RICO claims voluntarily dismissed (Oct. 5, 1999).

B.A.C Local No. 32 Insurance Trust Fund v. *Philip Morris, Inc.*, No. 97-75675 (E.D. Mich.) (Judge Duggan); RICO and federal antitrust claims voluntarily dismissed (Sept. 18, 1998).

C. COURTS CERTIFYING FOR § 1292(b) APPEAL

Utah Laborers' Health & Welfare Trust Fund v. *Philip Morris, Inc.*, No. 2:96CV 829B, slip op. (D. Utah Mar. 30, 1999) (Judge Benson) (denying motion to dismiss RICO and federal antitrust claims); slip op. (Sept. 3, 1999) (granting motion for § 1292(b) certification); leave to appeal granted (10th Cir. Nov. 22, 1999).

D. COURTS WHICH HAVE NOT DISMISSED RICO AND FEDERAL ANTITRUST CLAIMS OR CERTIFIED PURSUANT TO § 1292(b)

Eastern District of New York (Judge Weinstein) in two cases: (1) *National Asbestos Workers Medical Fund* v. *Philip Morris, Inc.*, 23 F.Supp.2d 321 (E.D.N.Y. 1998) (denying motion to dismiss RICO claims); and (2) *Blue Cross and Blue Shield of New Jersey* v. *Philip Morris, Inc.*, 36 F.Supp.2d 560 (E.D.N.Y. 1999) (denying motion to dismiss in case brought by various Blue Cross/Blue Shield entities). The following orders and decisions were captioned jointly in both cases: 1999 WL 592669 (Aug. 2, 1999) and 1999 WL 706113 (Sept. 7, 1999) (denying motions for summary judgment and to dismiss fourth amended complaint); slip op. (Oct. 13, 1999) and 1999 WL 1000144 (Nov. 1, 1999) (denying § 1292(b) certification); *In re Philip Morris, Inc.*, No. 99-3058, order (2d Cir. Oct. 26, 1999) (denying petition for mandamus); petition for rehearing *en banc* filed Nov. 8, 1999.

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No. 99-545

IN THE
Supreme Court of the United States

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, *et al.*,
Petitioners,
v.
PHILIP MORRIS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; LABORERS INTERNATIONAL UNION OF NORTH AMERICA; INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & REINFORCING IRON WORKERS; INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS; AND OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA IN SUPPORT OF PETITIONERS

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; the Laborers International Union of North America; the International Association of Bridge, Structural & Reinforcing Iron Workers; the International Union of Elevator Constructors; and the Operative Plasterers' and Cement Masons' International Association of the United States and Canada ("International Unions") respectfully move this Court for leave to file the attached brief *amicus curiae* in support of the petition for writ of *certiorari*. The consent of Petitioners to the filing of this brief has been obtained and the letter reflecting such consent has been filed with the Clerk of the Court. The consent of Respondents has been sought but has not been granted, nor has it been refused.

Amici curiae are five international unions which among them represent over 1.1 million blue collar workers nationwide in construction, manufacturing and other major industries. *Amici curiae* and other unions have for many decades negotiated for the creation of multiemployer health and welfare funds to provide for the health needs of workers and their families. Accordingly the International Unions and their members have a vital interest in the instant case, which threatens to curtail the ability of multiemployer health plans to redress financial injury to plan assets. If the unprecedented restrictions which the lower federal courts have recently imposed on the right of plan trustees to bring suit are allowed to stand, then the economic soundness of these trust funds will be seriously undermined.

The International Unions believe that they are uniquely situated to offer insight into the nature and functions of multiemployer health and welfare plans, which are both a critical component of national health care and a successful model for America's primarily private, primarily employment-based health care system. The International Unions therefore respectfully move this Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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November 23, 1999

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STATEMENT OF INTEREST[1]

Amici curiae are five international unions which represent over 1.1 million blue collar workers nationwide in

[1] *Amici curiae* state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. Moreover, no person or entity other than *amici curiae* and their counsel made

construction, manufacturing and other major industries. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry represents 300,000 workers in all aspects of the plumbing and pipe-fitting trades. The Laborers International Union of North America represents 600,000 laborers. The International Association of Bridge, Structural & Reinforcing Iron Workers represents 150,000 tradesmen. The International Union of Elevator Constructors represents 27,000 workers in the elevator, escalator, and related industries. The Operative Plasterers' and Cement Masons' International Association represents over 39,000 workers in the plastering and cement masons trades.

For the better part of the twentieth century, *amici curiae* and other unions have negotiated for the creation of multi-employer health and welfare funds to provide for the health needs of workers and their families. Such funds, often referred to as Taft-Hartley plans, are the primary or sole source of health coverage for over 30 million Americans, including those represented by *amici curiae*. Taft-Hartley plans are funded by collectively bargained employer contributions which are placed in trust and managed for the sole and exclusive benefit of employees and their dependents. Such plans cover workers in industries as diverse as building and construction, retail, food, clothing and textiles, transportation, mining, services, entertainment, longshoring, maritime, hotel and restaurant, and manufacturing. If not for the existence of such plans, many working families would lack adequate health coverage because of the transient employment patterns and the small size of many employers in these industries. The plans have served as a model for the

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a monetary contribution to the preparation or submission of this brief. The consent of Petitioners to the filing of this brief has been obtained. The consent of Respondents has been sought but has not been granted.

nation's primarily private, primarily employment-based health care system.

The decision below and similar recent decisions of the Second, Seventh and Ninth Circuits deny to Taft-Hartley, multiemployer health plans the ability to pursue RICO and antitrust claims for economic injury to trust fund assets caused by the intentional wrongful acts of tobacco industry defendants. As *amici curiae* discuss below, the denial of these claims on the basis of "remoteness"—which the teachings of this Court identify as a policy-driven doctrine —flies in the face of national health care policy and its reliance on the Taft-Hartley plan model. If, contrary to established precedent, Taft-Hartley plans cannot employ remedial statutes to redress intentional injury to plan assets, then the economic soundness of these trust funds will be seriously undermined. Taft-Hartley plans have been a direct target of the tobacco industry's campaign of deception, and they have incurred billions of dollars in additional health care costs because of the industry's intentional, unlawful conduct.

Amici curiae believe that the long experience they and their 1.1 million-strong members have had with the Taft-Hartley model uniquely situate them to offer insight into the extremely significant issues presented by this petition. This brief is submitted out of a deep concern that a restrictive application of the "remoteness" doctrine by the lower federal courts may jeopardize the continued viability of entities that are a cornerstone of modern health care.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Petitioners Steamfitters Local Union No. 420 Welfare Fund, *et al.*

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION BELOW IS DEMONSTRABLY WRONG AND REACHES A RESULT DIRECTLY CONTRARY TO THE RULINGS OF THIS COURT.

A. The Health Fund Plaintiffs Are Trusts Governed by ERISA, the Taft-Hartley Act and the Common Law of Trusts.

The plaintiff funds are established by, and administered and maintained according to the terms of, written declarations of trust. Each fund has a named fiduciary, typically a board of trustees appointed half by labor and half by management. The funds are governed by the terms of Section 302 of the Labor Management Relations Act of 1947 ("Taft Hartley Act"), 29 U.S.C. § 186, and by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* While these statutes are detailed and far-ranging, Congress intended the federal courts to draw heavily on traditional trust law principles to fill any statutory gaps. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). This Court has strongly relied on trust principles when assessing the right of Taft-Hartley trustees to assert causes of action to protect trust assets. *See Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

In the Taft-Hartley Act, Congress required that collectively bargained welfare funds be established as formal trusts, that plan assets be held in trust, and that they be administered for "the sole and exclusive benefit" of employees and their dependents. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (citing 29 U.S.C. § 186(c)(5)). ERISA largely codified the trustees' strict fiduciary duties, while allowing gaps to be filled in by reference to tradi-

tional trust law. *Amax Coal,* 453 U.S. at 332-34. Fund trustees bear an unwavering duty of loyalty to trust beneficiaries, to the exclusion of all others including each trustee's appointing party. *Amax Coal,* 453 U.S. at 329-30 (citing, *inter alia,* RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1957) and 2 A. Scott, *Law of Trusts* 170 1967)). Trust fund assets, accordingly, may not inure to the benefit of union or employer, but must be held in trust, and preserved and applied for the exclusive benefit of the trust beneficiaries. *Amax Coal,* 453 U.S. at 329-32; *Lewis v. Benedict Coal Corp.,* 361 U.S. 459, 468-70 (1960).

Funding for multiemployer plans comes from employer contributions, the level of which is collectively bargained, generally in lieu of additional wages to the employees. *See Lewis v. Benedict Coal Co.,* 361 U.S. at 469. Once paid, contributions become plan assets which may not inure to the benefit of the employer. ERISA § 403(c), 29 U.S.C. § 103(c); *Amax Coal,* 453 U.S. at 333 (quoting ERISA Section 403(c)(1)). Residual assets cannot be returned to contributing employers, even upon termination of a multiemployer welfare plan. 26 C.F.R. § 1.501 (c)(9)-4(d).

While ERISA trustees have substantial control over what plan of benefits will be provided to participants and beneficiaries, they have no power to fix or to raise contribution rates, which is a matter left to union and management negotiators. *See Amax Coal,* 453 U.S. at 336. Trustees have authority to defray reasonable expenses of administering plans and to invest assets in a manner that will minimize the risk of large losses. 29 U.S.C. § 1104 (a)(1). In enacting ERISA, Congress had among its objectives "to make applicable the law of trusts [and] to establish uniform fiduciary standards to prevent trans-

actions which dissipate or endanger plan assets." *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979) (quoting U.S.C.C.A.N. 5186, 93rd Cong. 2d Sess. (1974)). If the resources of such a trust become insufficient to support the plan of benefits and no collectively bargained contribution increase is forthcoming, the trustees' alternative is to lower benefits *See Robbins v. Lynch Truck Serv.*, 836 F.2d 330, 332-33 (7th Cir. 1988).

ERISA recognizes that an employee welfare benefit plan may either use trust assets directly to pay for medical care (as most of them do), or purchase insurance for that purpose. 29 U.S.C. § 1002(1) ("welfare benefit plan" defined as plan which provides benefits "whether . . . purchased through the purchase of insurance or otherwise"). Whereas insured plans use plan assets to purchase insurance to cover benefits, *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), self-insured plans pay benefits directly from the *res* of the trust, *i.e.*, "contributions in, benefits out." *See Central States S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1151 (7th Cir. 1989). In all cases, the plans depend for their continued viability on the financial soundness of the trust.

B. Taft-Hartley Plans Provide Health Coverage for a Substantial Sector of the Public that Would Otherwise Be Unable to Secure Adequate Coverage.

1. *As Pooled Funds, Taft-Hartley Plans Provide Both Portability and Economies of Scale that Are Essential to the Availability of Health Coverage for Much of the American Workforce.*

All of the collectively bargained employer contributions to a multiemployer health plan are pooled and invested as assets of the trust. It is from this pool that

benefits are paid to covered workers, retirees and their dependents to the extent that the plan is self-funded, and from which premiums are paid to the extent that the plan's benefits are insured through contracts with insurance companies or benefits are delivered through managed care organizations. Operating expenses are also paid from this asset pool. *See* NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS: AN OVERVIEW OF THEIR OPERATIONS, REGULATIONS AND CONCERNS 5 (1997) [hereinafter OVERVIEW].

This pooling characteristic of multiemployer plans provides workers with true portability of health coverage. See JUDITH F. MAZO, *Multiemployer Health Plans: Why and How Do They Work?*, 10 BENEFITS L. J. 47, 53-56 (1997). A covered worker who changes from one contributing employer to another maintains seamless coverage under a plan despite frequent changes in employment. This portability is essential for workers in industries characterized by mobile and intermittent patterns of employment, such as building and construction, entertainment, clothing, and longshoring.

Participation in a multiemployer health plan also enables small employers, which would be unable to maintain a separate health plan, to provide benefit coverage for their workers. By providing a central fund through which portable coverage is provided to workers as they move from one contributing employer to another, Taft-Hartley plans effectively treat all contributing employers —scores, hundreds, or even thousands of employers—as a single employer for purposes of providing health and welfare benefits coverage to workers, dependents and retirees. Thus, Taft-Hartley plans offer substantial economies of scale in administration and enhanced purchasing power with health care providers, insurers and managed care organizations.

Taft-Hartley, multiemployer plans have been so successful as a vehicle for providing health care coverage that Congress has considered them as a model for efforts to expand health care coverage for the more than 40 million uninsured Americans, most of whom work for small employers. *See, e.g.*, H.R. 2990, 106th Cong., 1st Sess., Title II, as passed by the House of Representatives on October 6, 1999, 145 CONG. REC. H9431, H9434-H9443, H9473 (daily ed., October 6, 1999).

2. ***Taft-Hartley Funds Have Limited Means Available to Deal with Unexpected Diminishments of Trust Assets.***

Over the years, Taft-Hartley trustees, with professional assistance, have designed health and welfare programs that balance the benefit needs and wants of workers with the financing that can be provided by collectively bargained contributions. Given that labor representatives (usually elected union officers) make up one-half of each board of trustees, the tendency is for a board to adopt the most generous benefit package that a plan can reasonably afford. *See* OVERVIEW, supra, at 8. Thus, for those workers, dependents and retirees that they serve, Taft-Hartley plans provide significant health care security and hold an important place in the national economy.

The trustees' budget balancing, however, can be upset by unexpected declines in contribution income or by unusual increases in cost. Often, a plan may experience both, since an economic recession in the industry not only tends to cause a reduction in contribution income, but also tends to prompt an increase in benefits utilization by idled workers. *See* MAZO, *supra*, at 51-52. Plans can take steps to protect against economic adversity, such as maintaining reserves, obtaining stop-loss insurance, or insuring some or all of the plan's benefits; however, such protective

devices are not always appropriate or sufficient. *See* OVERVIEW, *supra*, at 8-9. Trustees have additionally had to rely upon other tools to maintain a plan's viability in times of economic adversity, such as adjustment of eligibility rules (*e.g.*, requiring more covered employment for benefit eligibility), reduction of benefit levels, increases in out-of-pocket charges, and elimination of particular benefits.

Trustees may also request the bargaining parties to negotiate an increase in the collectively bargained contribution rate. However, it may take months or even years to effectuate such an increase, particularly where the contribution rate is fixed for the term of the collective bargaining agreement and where the plan receives contributions pursuant to many collective bargaining agreements with differing expiration dates and terms. More importantly, a contribution increase in a very real sense comes out of the paycheck of the worker, since hourly contributions are considered a component of the employee's wage package. *See id.* at 6. Thus, a contribution hike, like a reduction in benefit levels, is likely to hit the worker directly in the pocketbook.

In short, Taft-Hartley health funds are limited in their ability to protect trust assets from the effects of outside forces. Unlike single employer corporate-type plans, multiemployer plans cannot simply dip into the corporate treasury to compensate for unanticipated costs, shortfalls or losses to trust assets. Thus, recognition of the ability of Taft-Hartley funds to pursue legal remedies when such losses are caused by third parties is critical.

C. The Rulings of this Court Favor Allowance of Claims by Taft-Hartley Funds to Redress Injury to the Trust.

The dominant body of common law that applies to employee welfare plans is the traditional law of trusts.

Trust law governed the operation of employee benefit plans under the Taft-Hartley Act, and was largely incorporated into ERISA. As the Supreme Court has stated:

> ERISA abounds with the language and terminology of trust law . . . ERISA legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the law of trusts'. . . . . Given this language and history, we have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 56 (1987) and H. R. REP. No. 93-533, p. 11 (1973)). Moreover, the federal courts are to consult common law trust principles in resolving claims arising from the relationship of an ERISA plan and its participants. *See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 570 (1985) (Congress invoked common law of trusts to define duties and authorities of trustees); *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329-334 (1981) (the operation of plans is governed by traditional trust law principles); *Rodrigues v. Herman,* 121 F.3d 1352, 1356 (9th Cir. 1997) (fiduciary duty measured by common law trust standard); *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir. 1982) (citing RESTATEMENT (SECOND) OF TRUSTS, Scott on Trusts, and Bogert on Trusts as determinative of ERISA trustees' duties). Application of trust law furthers the paramount statutory purpose of protecting employees' interests in their continuing medical benefits.

Traditional trust law clearly confers on fund trustees the right to bring tort actions and statutory claims based on injury to the trust *res.* In particular, the RESTATEMENT (SECOND) OF TRUSTS § 285 (1959) expressly provides

that a *fund trustee "can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust."* (Emphasis added.) With regard to tort actions, "[i]f a third person commits a tort with respect to the trust property, the trustee can maintain such actions at law as he could maintain by reason of his ownership of the property as if he held it free of trust." *Id.*, Comment (a). *See also* Scott & Fratcher, *The Law of Trusts* §§ 280-280.1, Vol. IV, at 6-7 (4th ed. 1987) (trustee is proper party to maintain action against third person who has committed tort against trust property); Bogert & Bogert, *The Law of Trusts & Trustees* § 869, at 114-15 (rev. 2d ed. 1995) (if third person without justification causes harm to trust property, normally only trustee can sue for damages). Accordingly, Taft-Hartley trustees have the clear right to pursue tort actions and other legal claims stemming from damages to the trust.

This Court has long recognized that protection of the soundness of Taft-Hartley health funds lies squarely on the shoulders of the fund trustees and that the trustees must therefore be armed with appropriate and unfettered means of judicial redress. In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), a Taft-Hartley fund sued an employer for delinquent contributions and the employer claimed that strike damages stemming from the union's misconduct should be allowed as a setoff. Noting that by law the fund existed for the sole and exclusive benefit of the employees and that such provisions for employee security are "a commonplace of modern industrial relations," the Court held that allowance of the setoff would place an unconscionable burden on the employees and their families and would be contrary to national labor policy. 361 U.S. at 465, 468-69. Accordingly, the fund was entitled to collect the full amount of the contributions owed notwithstanding the unlawful strikes and work stoppages. *Id.* at 471.

In *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), the issue was whether Taft-Hartley trustees could seek judicial enforcement of employers' contribution obligations without exhausting the arbitration procedures in the collective bargaining agreement. Noting that there was no indication of such a requirement in the trust agreements themselves, the Court stated:

> This is not surprising. These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective bargaining agreement would have an adverse effect on the other participants. The enforcement mechanisms established in the trust agreements protect the collective interests of the parties from the delinquency of individual employers by allowing the trustees to seek prompt judicial enforcement of the contribution requirements. It is unreasonable to infer that these parties would agree to subordinate those mechanisms to whatever arbitration procedures might be required by a particular employer's collective bargaining agreement.

466 U.S. at 373-74 (footnotes omitted). Thus, once again, the Court refused to place a condition precedent on the trustees' ability to seek judicial relief necessary to protect the trust corpus.

In *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, the Court was presented with the question of whether two large Taft-Hartley benefit plans were entitled to a court order permitting them to conduct a field audit of an employer which included examination of records of all employees, not just those covered by the plans. 472 U.S. 559. The court of appeals held that nei-

ther the trust documents or ERISA authorized an audit of this scope and held that the audit could not be enforced. *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983). This Court reversed, based on the policies of ERISA and on the common law of trusts. 472 U.S. at 568-69.

ERISA, the Court recognized, was grounded in the recognition that "there had been a 'rapid and substantial' growth in the 'size, scope, and numbers' of employee benefit plans and that 'the continued well-being and security of millions of employees and their dependents are directly affected by these plans.' 29 U.S.C. § 1001(a)." 472 U.S. at 569. Further, the Court noted:

> In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of "assuring the equitable character" of the plans. Thus, rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts, as under the Central States trust agreements, trustees are understood to have all "such powers as are necessary or appropriate for the carrying out of the purposes of the trust." 3 A. Scott, Law of Trusts § 186, p. 1496 (3d ed. 1967) (hereinafter Scott).

472 U.S. at 570 (footnotes omitted).

One of the "fundamental common-law duties of a trustee" incorporated by ERISA and imposed on fund trustees is the duty "to preserve and maintain trust assets." *Id.* at 572. ERISA's fiduciary and other provisions of the Act offered strong support, according to the Court, of the auditing power claimed by the plaintiff funds. *Id.* at 573. The court of appeals' conclusion that other parties, such

as the union, the Department of Labor or the covered employees themselves, would sufficiently protect the needs of the funds in the absence of the full-scope audit power was squarely rejected by the Court, based primarily on the belief that the breadth of the trustees' duties was such that they and they alone were in a position to fully vindicate the rights of the plans and to protect plan assets. *Id.* at 574-79. The Court also rejected the court of appeals' suggestion that the broad audit power should be denied in favor of an after-the-fact remedy which would be less intrusive on sectors of the employer's business which were concededly not covered by the benefit plans. *Id.* at 580. In conclusion, seeing no reason in ERISA or in the plans themselves to limit the audit authority of the trustees, the Court came down squarely on the side of the trustees' right to seek judicial relief. *Id.* at 582.

As these rulings demonstrate, the Court has been consistently mindful of the federal policy favoring protection and preservation of Taft-Hartley plan assets when addressing the right of such plans to seek judicial redress. Despite occasional efforts on the part of lower courts to place conditions on suits by multiemployer plans, the Court has consistently made clear that Taft-Hartley trustees are not to be judicially disabled or hampered from pursuing full judicial remedies. Moreover, the Court in these cases was unreceptive to the contention—mirrored in the decision of the court below—that trustee actions should be disallowed because other parties such as participants or employees might serve as plaintiffs to avenge the same interests.

D. The Court Below, in Denying the Trustees a Cause of Action Based on the Judicially Created Doctrine of Remoteness, Failed to Follow this Court's Precedent.

This Court has made clear in both RICO and antitrust cases that proximate cause analysis does not consist of "'a black-letter rule that will dictate the result in every case.'" *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 274 n.20 (1992) (quoting *Associated Gen. Contractors v. California State Council*, 459 U.S. 519, 536 (1983) ("*AGC*")). The "directness" or "indirectness" of an injury for proximate cause purposes is a function of three interrelated policy considerations which motivate the doctrine. First, the more indirect an injury, the more difficult it will be for a court to distinguish damages attributable to the violation from those attributable to independent causes. *See Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 542-43. Second, the more indirectly injured a plaintiff, the more the risk that the court may be forced to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury. *See Holmes*, 503 U.S. at 269: *AGC*, 459 U.S. at 543-44. Finally, when there exist logical plaintiffs more directly injured by the harmful conduct, there is less of a risk that the wrong will go unremedied. *See Holmes*, 503 U.S. at 269-70; *AGC*, 459 U.S. at 541-42.

The Court noted in *Holmes* that the term "direct" is simply a reference to the proximate cause inquiry informed by the considerations set forth above. 503 U.S. at 274 n.20. Thus, "direct injury" is not a litmus test, but merely a label attached to harms deemed remediable in light of the three identified policy concerns. The underlying question is not whether an injury is "direct" or "indirect," but whether it is sound judicial policy for a claim to be allowed.

To date, the courts of appeals undertaking the policy analysis mandated by *Holmes* and *AGC* have concluded that smokers are the only plaintiffs who should be allowed to sue to recover the costs of treating smoking-related disease, and that funds "must lose" if they sue on RICO and antitrust grounds because they were supposedly "not deceived" and unfairly seek to avoid contributory negligence, assumption of risk, and other traditional tort defenses asserted by tobacco companies against smokers. *See, e.g., International Bhd. of Teamsters Health Fund v. Philip Morris*, 1999 WL 1034711 (7th Cir. Nov. 15, 1999), at *3. That conclusion is an affront to the facts pleaded in the funds' complaints and contrary to this Court's standing precedents. The funds have pleaded how the tobacco industry extended its pattern of deception well beyond smokers. The industry recognized the danger to its markets posed by efforts to improve health through reducing smoking rates undertaken by government officials, medical associations, health payors, employers, and labor unions—and accordingly those groups, including the fund plaintiffs in these cases, were chosen by the tobacco industry as targets for deceptive and anti-competitive misconduct. The notion that all claims against the tobacco industry must be subject to "traditional defenses" applicable to tort claims ignores the very purpose of RICO—in the words of this Court, to "supplement old remedies" available under existing tort laws. *Sedima v. Imrex Co.*, 473 U.S. 479, 498 (1985). If the funds are to be deprived of standing to sue under RICO and antitrust because courts of appeals insist that these traditional defenses must be held inviolate when smoking-related injuries are at issue, then the whole congressional purpose in enacting the later statutes is undone.

The specific policy considerations set forth in *Holmes* and *AGC* also favor allowing the Taft-Hartley trusts their

causes of action. First, any difficulties in calculating the funds' damages will not be a function of "indirectness" or difficulty in separating out other injury-causing factors. The funds assert that they have incurred increased and unnecessary tobacco-related health care costs as a direct result of the tobacco companies' intentional and wrongful acts, which were targeted at the funds themselves. The trustees should be allowed to present their proof on these issues, not barred at the door.

The second factor, risk of multiple recovery, should pose no obstacle to this important action. The costs incurred, and damages suffered, by Taft-Hartley plans are recoverable by the plans alone. The personal injury costs to participant smokers are likewise not recoverable by the funds. Since the entire purpose of the trust is to fund the medical costs of participants, the trustees have a right and duty to seek redress when medical costs (and the financial health of the fund) are adversely affected by the intentional and wrongful acts of others. Accordingly, the risk of multiple recovery is minimal or nonexistent.

Finally, but most significantly, there are *no* other potential "private attorneys general" available to redress injuries to fund assets. Participant smokers—whose cost of tobacco-related medical expenses has been paid by the funds—have no individual incentive to prosecute actions relating to these losses. And under common law trust principles, *only* the trustees have the standing to assert these claims in the first instance. In these circumstances, the likelihood that these harms will go unremedied if a cause of action is not allowed is not merely a risk, it is a virtual certainty.

CONCLUSION

Should the decision below be upheld, the public interest in the soundness of multiemployer medical plans would be badly disserved. This and similar rulings from other circuits threaten to seriously erode the well-established principle that Taft-Hartley trustees are the proper parties to vindicate the federally recognized interest in the soundness of these funds. The common law of trusts, which ERISA incorporates, bestows on the trustees the clear right to pursue tort actions and other legal claims stemming from damages to the trust. The "remoteness" rulings by these lower courts raise a judicially created bar that is flatly contrary to the strong policy favoring unfettered rights of action by Taft-Hartley trustees. If allowed to stand, these unfortunate decisions will seriously erode the ability of multiemployer plans to protect and preserve the assets that fund the health care of millions of citizens.

Respectfully submitted,

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(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, ET AL.,

Petitioners,

v.

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decisions below are unprecedented. They have disabled the only conceivable plaintiffs from suing under the RICO and antitrust laws for the multibillion-dollar tobacco-related economic loss at issue. In what one trial court has described as the "mother of all RICO actions," *Florida v. American Tobacco Co.*, No. CL95-1466, slip op. (Fla. Cir. Ct. Dec. 13, 1996), respondents claim that there is no RICO remedy.

Petitioners are the only possible RICO and antitrust plaintiffs. No one else can sue for the economic injury suffered by the trust funds — not smokers, not employers, not insurers. Never before has this Court, or any other lower court identified by respondents, approved a standing/proximate cause inquiry which precluded all possible plaintiffs from suing for a given economic loss. The purpose of the standing/proximate cause inquiry is to strengthen statutory enforcement by concentrating each claim in a single plaintiff, not to weaken enforcement by precluding claims by the sole plaintiff capable of suing. The lower courts did not merely misapply the proximate cause factors of *Holmes v. SIPC*, 503 U.S. 258 (1992); rather, they turned the concept of standing upside down by effectively granting RICO and antitrust immunity to the tobacco defendants with respect to claims involving non-governmental medical care costs.

This Court has held that the federal antitrust statutes do not preempt state antitrust laws. *California v. ARC America Corp.*, 490 U.S. 93 (1989). In a bizarre twist of that holding, respondents contend that state products liability actions by individual smokers somehow work a *reverse preemption* of federal RICO and antitrust remedies by health trust funds suing for medical costs that the smokers never bore. Yet RICO and antitrust were meant to *supplement* (not to be *supplanted by*) what Congress perceived as inadequate existing state remedies. Whether the availability of common law remedies to *one* set of plaintiffs may displace federal RICO and antitrust claims for *different* damages by a *different* set of plaintiffs is a question of vital public importance. And this case is a particularly good vehicle to address that question, for — as the Third Circuit properly noted — "there is little danger of duplicative

litigation or complex apportionment of damages." App. in No. 99-545 at 25a. Indeed, respondents' concession that the health trusts may sue in subrogation (Opp. Cert. 5, 11) demonstrates that there is no genuine threat of duplicative suits by employers or insurers, for if such a risk existed, it would also apply to the funds' subrogation claims.

1. Conflicts with decisions of this Court. The decisions below conflict with the many decisions of this Court holding that a plaintiff may sue under RICO or the antitrust laws for injuries arising from effects mediated through a third party. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), for example, this Court held that a Blue Cross plan participant could bring an antitrust suit against an alleged unlawful conspiracy which had incidentally harmed her. Contrary to respondents' suggestion, this Court did not opine that McCready was "directly injured." Opp. Cert. 12. Rather, McCready was injured only incidentally; she represented precisely the class of patients whom defendants had *failed* to dissuade from seeing and paying psychologists. McCready and her class were not the causal means by which any injury was inflicted at all. It was the patients who *were* dissuaded from seeing the psychologists who were the causal means by which the injury of lost business was inflicted on the psychologists. McCready's injury was merely an unintended byproduct of the defendants' using the denial of reimbursement successfully to dissuade *other* patients not to see psychologists. Nonetheless, this Court held that McCready *had* standing even though she was not a direct competitor or consumer of defendants (she did not buy insurance and did not want to buy psychiatry services) and was not a direct participant in the restrained market. 457 U.S. at 479. "Her psychologist can link no claim of injury to himself [because] . . . he has been fully paid . . . And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits." 457 U.S. at 475. The same reasoning applies here: the funds, who are directly out of pocket, may sue under RICO and antitrust, while smokers may not.

Similarly, in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994), this Court held that a business has standing to sue for injuries to its property by virtue of racketeering-inflicted personal injuries to its workers. Respondents' claim that *NOW v. Scheidler* was limited to Art. III standing is flatly wrong: the *Holmes* factors were briefed and argued before this Court. *See* Br. of Respondents Randall A. Terry, *et al.*, No. 92-780, 1993 WL 459719, at *11 (Sept. 29, 1993).

Respondents claim that *Associated General Contractors v. California State Council*, 459 U.S. 519 (1983), and *Holmes v. SIPC*, 503 U.S. 258 (1992), stand for the proposition that there may be a RICO or antitrust violation without a remedy. But in fact both cases recognized that there *would* be a plaintiff to bring a federal statutory suit for the injuries involved. In *Holmes*, this Court recognized that its holding did not necessarily bar indirect claims (1) by brokerage clients suing for manipulation of stock they purchased from the brokerage firm, *see* 503 U.S. at 272 n.19, and (2) by nonpurchasing brokerage clients suing for stock parking that had the effect of evading the firm's capital requirements. *Id.* In *AGC* this Court opined that unionized subcontractors *could* sue even though their injury was indirect. 459 U.S. at 541-42. Both *Holmes* and *AGC* specifically rejected the black-letter remoteness rule advanced by respondents in these cases. 503 U.S. at 272 n.20; 459 U.S. at 536 n.33.

Although in *AGC* this Court recited an example drawn from the facts of *Anthony v. Slaid*, 52 Mass. 290 (Mass. 1846), it included important caveats that respondents omit: "Where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote . . . *unless the wrongful act is willful for that purpose.*" 459 U.S. at 533 n.25 (emphasis added) (citing 1 J. Sutherland, THE LAW OF DAMAGES 55-56 (1882)); *see also* 459 U.S. at 537 n.35 (the "specific intent of defendant to cause injury to a particular class of persons should 'ordinarily be dispositive' in creating standing to sue").

The Third Circuit criticized respondents' use of *Anthony*. App. in No. 99-545, 17a-18a n.5. In *Anthony v. Slaid*, there was no claim that the tortfeasor (not even the defendant himself but only his *wife*) intended the guarantor to bear increased medical costs. And

Anthony v. Slaid would surely have been decided differently if (as here) the tortfeasor had prevented the plaintiff from providing prompt first aid, leading to aggravated medical problems for the pauper and increased expense for the plaintiff.

Both the Sutherland treatise and subsequent Massachusetts cases make clear that the proximate cause test is satisfied where (as here) the defendant intends to cause injury to the plaintiff (i.e., the health trust funds). *See* 1 J. Sutherland, THE LAW OF DAMAGES 128 (1916) (citing *Gregory v. Brooks*, 35 Conn. 437, 446 (1868) (holding that defendant was liable to wharf owner for deceiving a ship captain into moving his ship, which in turn resulted in lost rent to the wharf owner; although the injury to the wharf owner was an indirect effect of the deceit on an intervening party (the ship captain), "the cases are numerous where injuries have been holden actionable although not directly committed upon the plaintiff . . . if they were intended to affect and did injuriously affect him")); *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 280 Mass. 282, 286 (1932) (proximate cause found where there is "allegation of malice on the part of the defendant toward the plaintiff" or "deliberate design by the defendant to accomplish a definite end regardless of consequences to others").

Respondents cite *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), but that case simply declined to recognize a new substantive tort under federal common law for a claim based on "tortious interference by a third person with the relation between the Government and the soldier." *Id.* at 304. More generally, respondents' invocation of common-law principles is misplaced. The RICO and antitrust statutes were intended to overcome limitations in existing common-law remedies. And smoking by fund beneficiaries is hardly an "intervening" cause that can render petitioners' injuries "indirect" or relieve respondents of liability. Tobacco companies have deliberated targeted the blue-collar populations whom the trusts serve. Tobacco use and tobacco-related illnesses are "a normal consequence of a situation created by" the defendants' misconduct, and, as such, "not a superseding cause of harm which such conduct has been a substantial factor in bringing about." Restatement of Torts (Second) § 443 (1965).

2. The direct nature of petitioners' claim. The decisions of this Court thus establish that a plaintiff may sue under RICO or the antitrust laws for injuries arising from effects mediated through a third party. Even if they did not, however, the direct nature of the health trusts' injury would render the supposed "remoteness" principle inapplicable. The trusts' injuries derive not merely from the fact that respondents defrauded smokers; the injuries also derive from the fact that the plaintiff health funds were *directly* lied to, defrauded, and deprived of the benefits of new and safer tobacco products. This effect of defendants' misconduct on the health trusts was not mediated through any effect on a third party. Evidence adduced in the state tobacco litigation has shown that the tobacco companies specifically targeted employers, unions and health funds, health and life insurance companies, public health organizations, medical societies, health maintenance organizations, and federal, state, and local governmental bodies. The tobacco companies sought to prevent these entities from taking remedial measures to decrease smoking by workers, particularly the blue collar workers represented by the health trusts here, whose rates of smoking have remained unchanged since World War II. The tobacco companies stimulated the filing of collective bargaining grievances against employers and supported litigation by workers and their unions to prevent or end smoking restrictions. The tobacco industry furnished unions with guidelines for collective bargaining issues regarding smoking. The industry set up, through the Tobacco Institute, a Tobacco Industry Labor Management Committee ("LMC") to work with the Tobacco Institute staff and consultants to spread disinformation and influence the position of the labor movement on smoking issues. The LMC, for example, persuaded unions not to support OSHA's regulations on smoking. When in the mid-1970s Johns-Manville sought to outlaw smoking in its asbestos plants, the tobacco companies covertly assisted unions in opposing the ban: "The position of unions in the asbestos-smoking controversy is anti-anti-smoking. They are more opposed to Johns-Manville than to tobacco." (Memorandum of June 8, 1979 from Fred Panzer to Horace Kornegay).

Respondents are thus flatly wrong in suggesting that the health trusts' injuries are "entirely derivative" of the harm suffered by

smokers. Opp. Cert. 8. In fact, the economic loss suffered by the health trusts here is clearly separate from (and not derivative of) the personal injury suffered by smokers. The injury alleged is the funds' inability to take appropriate anti-smoking measures. The health effects of smoking are relevant only to the *measure* of damages, not to the fact of injury. If anything, the physical injuries suffered by smokers were derivative of the harms inflicted on the health trusts — not the other way around — because the health trusts were unable as a result of the tobacco industry's fraudulent conspiracy to take steps to protect their plan participants from illness and death.

3. Conflicts within the cases at bar. Certiorari is warranted for the further reason that there is deep confusion within, and indeed conflict among, the decisions of the courts of appeals in these very cases. For example, the Third Circuit held that "there is little danger of duplicative litigation or complex apportionment of damages." App. in No. 99-545, at 25a. The Second and Ninth Circuits disagreed. App. in No. 99-642, at 14a; App. in No. 99-791, at 19a.

The Second Circuit disagreed with itself, withdrawing its original opinion on rehearing, reconsidering the matter for twelve weeks, and issuing an amended opinion that reached the same result but that included new footnotes, inconsistent with tone and substance with the text. App. in No. 99-791, at 7a n.3, 15a n.4.

The Second, Third, and Ninth Circuits insisted that calculating tobacco-related medical costs would be impermissibly speculative. App. in No. 99-545, at 26a; App. in No. 99-642, at 11a-13a; App. in No. 99-791, at 17a-18a. Yet the Seventh Circuit concluded that "[s]tatistical methods could provide a decent answer — likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit." *International Bhd. of Teamsters v. Philip Morris, Inc.*, 1999 U.S. App. Lexis 29907, *12 (7th Cir. Nov. 15, 1999).

The Seventh Circuit premised its holding on the assumption that individual smokers *could* bring their own antitrust and RICO actions, *id.* at *11-12, *19, and described the contrary view as "silly." *Id.* at *11. The Third Circuit indulged a similar assumption. App. in No. 99-545, at 26a n.10. Yet the other courts of appeals rejected the positions of the Third and Seventh Circuits, App. in No.

99-642, at 9a-10a; App. in No. 99-791, at 19a, as do respondents themselves. Opp. Cert. 11.

Indeed, respondents disagree with the entire approach taken by the three courts of appeals in these cases. Respondents insist that the lower courts erred in even considering the individual *Holmes* factors at all. Respondents contend there is a categorical, black-letter rule that third-party health payors are automatically too remote to recover damages. Opp. Cert. 10 n.* While respondents' argument has no validity, the fact that there is such fundamental disagreement over an important principle of federal law warrants certiorari.

4. Conflicts with other tobacco cases. Certiorari is warranted in light of the irreconcilable conflicts between the courts of appeals' judgments in these three cases and decisions in other tobacco litigation. The states typically sought damages for state employee health and welfare funds (the same damages as sought here), yet in the state tobacco cases, twenty-three out of twenty-four courts rejected the tobacco companies' motion to dismiss in whole or in part, and the industry settled for over $206 billion. The courts rejected respondents' remoteness argument in the context of federal RICO and antitrust claims, *see Texas v. American Tobacco Co.*, 14 F. Supp.2d 956, 968 (E.D. Tex. 1997); *Rosello v. Brown & Williamson*, No. 97-1910 (JAF), slip op. (D.P.R. Aug. 10, 1998); in the context of common-law claims; and in the context of state antitrust claims. *E.g., Minnesota v. Philip Morris*, 551 N.W.2d 490, 497 n.1 (Minn. 1996) (finding antitrust standing for both Blue Cross and the state, "[e]ven absent the statutory grant of authority") (mis-cited at Opp. Cert. 18 n.*); *McGraw v. American Tobacco*, No. 94-C-1707, slip op. at 6 (W. Va. 13th Cir. Feb. 13, 1997) (relying on *McCready*); *Washington v. American Tobacco Co.*, 1996 WL 931316, at *5 (Wash. Super. Ct. 1996) (holding that state would have standing even absent special statute); *Illinois v. Philip Morris, Inc.*, No. 96L 13146, slip op. at 8 (Ill. Cir. Ct. Nov. 13, 1997) (*Holmes* factors met because "the State alleges that Defendant's tortious conduct was directed not only to third parties but also towards the State itself .... Defendants not only foresaw but also intended that one of the consequences of their conduct was that the State would spend hundreds of millions of dollars").

Respondents claim that the state cases are distinguishable because states may sue in "quasi-sovereign" or parens patriae capacity by virtue of their "unique role relative to protection of [their] citizens." Opp. Cert. 17, 18. But the ability of states to sue under RICO and antitrust laws (both federal and state) is not based on a brooding omnipresence regarding state authority, but is simply a matter of statute, just as it is for health trust funds. Indeed, the health trusts have clearer authority to sue: although the tobacco companies vigorously contested (and still contest) the parens patriae theory, the right of health trusts to sue is undisputed. 29 U.S.C. § 1132(d)(1). In any event, the trusts enjoy a similar special relationship, "a type of *parens patriae* relationship with their insureds which is analogous to the parent-child relationship." *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F. Supp.2d 560, 581 (E.D.N.Y. 1999).

5. Conflicts with non-tobacco cases. The courts of appeals' decisions in these cases cannot be reconciled with the great weight of decisions outside the tobacco context. *See* Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW 95 & n.8 (1999 supp.). Respondents rely on the court of appeals' own efforts to distinguish established precedent, but these points have already been largely anticipated in the Petitions for Certiorari. *See, e.g.*, Pet. in No. 99-545, at 17-18 n.7 (rebutting Third Circuit's attempt to distinguish *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1168-69 (3d Cir. 1993)).

Respondents cite the Fourth Circuit's observation in *Mid Atlantic Telecom v. Long Distance Servs.*, 18 F.3d 260 (4th Cir. 1994), that a competitor's fraudulently low telephone rates caused a telephone company distinct injuries that were "not derivative of any losses suffered by its former customers." *Id.* at 264. But the court's reasoning proves our point: "[C]ustomers, of course, were the direct victims of the defendants' scheme to fraudulently inflate their telephone bills. Given the opportunity to engage in discovery, however, Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding ... customers, [the defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers)." *Id.* at 263. Similarly, the

tobacco defendants included the health trusts as a target of their fraud. Respondents' own argument demonstrates the circuit split.

Respondents follow the Seventh Circuit in attempting to distinguish *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), by noting the language in *Marshfield Clinic* that "[i]f the patients paid the entire fees to the Clinic and then were reimbursed in whole or part by Blue Cross, the Clinic would be right; only the patients could sue." *Id.* at 1414. But that caveat in the *Marshfield Clinic* opinion is immaterial. Here, the health trusts (not the smokers) paid the medical bills directly and suffered a direct injury. Moreover, the health trusts also dealt directly with the tobacco companies, in the sense that the health trusts were direct recipients of fraudulent information from the tobacco companies.[1]

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[1] Respondents invoke a number of alternative grounds for affirmance. Opp. Cert. 19 n.*. Unlike the courts of appeals below, respondents insist that the health trusts did not suffer injury to "business or property." However, the funds' economic injuries are not the same as, nor simply derived from, their beneficiaries' personal injuries. *See Scheidler*, 510 U.S. at 249; *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris*, 23 F. Supp.2d 771, 790 (N.D. Ohio 1998); *New Jersey Carpenters v. Philip Morris*, 17 F.2d 324, 338-39 (D.N.J. 1998); *Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 969 (E.D.N.Y. 1995).

Respondents also argue that an antitrust (although not a RICO) plaintiff must be a consumer or competitor in the restrained market. No decision of this Court has ever imposed such a requirement. *McCready* opined that the antitrust "'statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.'" 457 U.S. at 472. Likewise, *Associated General* expressly rejected any test based on whether the plaintiff was in the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." 459 U.S. at 536 n.33. This is an issue on which the lower courts are divided and by itself warrants certiorari. *See Sullivan v. Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994) (discussing conflicting decisions); *see also Province v. Cleveland Press Pub. Co.*, 787 F.2d 1047, 1052 (6th Cir. 1986); *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 745-46 (9th Cir. 1984); *Ashmore v. Northeast Petroleum Division of Cargill*, 843 F. Supp. 759, 769-70 (D. Me. 1994); *Donahue v. Pendleton Woolen Mills*, 633 F. Supp. 1423, 1435-39 (S.D.N.Y. 1986).

Respondents' further claims of inadequate pleading and of "common knowledge" (but not of addiction, manipulation of nicotine, or targeting of children) were not accepted by the courts of appeals and are makeweight.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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